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87-195

Supreme Court, U.S.
FILED
JUL 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANNA PENK, ET AL, Petitioner,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 28, 1987

VOLUME II

. Penk, et al, v. Oregon State Bod. of Higher Educ., 36 CCH Employment Practices Par. 35,049, partially reported.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ANNA PENK, ELAINE SPENCER, BERNICE GILMORE, MADRONNA HOLDEN, BETTY LEONARD, LOIS SCHREINER, G. JOANNE AMSPOKER, MARGARET LUMPKIN, and all others similarly situated,

Plaintiffs,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Defendant.

MARY H. DAVISON, ROSEMARY DUNN DALTON, POLLY ANN FISHER, LORRAINE B. FURBY, ANN L. HOFFSTETTER, MARGARET A. HUNTLEY, DIANNA L. KALE, SHERRY McLEOD MIHEL, MARY ANN PETRY, CAROL E. RATHE, JANE M. SIEGEL, BARBARA J. STEWART, RUTH WAUGH, MICHELE WOLLERT,

Intervenor-Plaintiffs.

No. 80-436 FR

United States District Court
District of Oregon

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FRYE, Judge:

This case came on for trial before The Honorable Helen J. Frye on February 8, 1984. The plaintiffs were represented by Don S. Willner, lead counsel; JoAnn B. Reynolds and Kathleen Haley. The defendant was represented by David B. Frohnmayer, Attorney General for the State of Oregon. Appearing in court on the defendant's behalf were Assistant Attorneys General James J. Casby, Jr., lead counsel, (the Oregon State Board of Higher Education, Eastern Oregon State College, and Oregon State University); Pamela L. Abernethy, (Western Oregon State College and Oregon Health Sciences University); Jerome Lidz (University of Oregon, Southern Oregon State College and Oregon Institute of Technology); Special Assistant Attorney General Linda R. Rodgers (Portland State University and

statistical issues); and private counsel Mark S. Dichter and Lawrence B. Fine (statistical issues).

Approximately 95 witnesses testified on behalf of the plaintiffs and 125 witnesses testified on behalf of the defendant. Testimony ended on November 9, 1984. Closing arguments were held on November 20, 1984. In all, the court considered hundreds of pages of affidavits and depositions and thousands of exhibits. The transcript consists of approximately 25,000 pages.

INTRODUCTION

This is an action brought by 22 women faculty members against the Oregon State Board of Higher Education (the Board). Plaintiffs allege that the Board discriminated against them individually because of their sex in violation of 42 U.S.C. Sec. 2000e-2(a) (Title VII), which provides in part:

> It shall be an unlawful employment practice for an employer--
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex, . . . or
>
> (2) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex, ...

Plaintiffs seek money damages on their individual claims. Plaintiffs also

allege that the Board engages in a pattern or practice of sex discrimination against women faculty members as a class. Plaintiffs seek class-wide money damages on their class claims.

History of the Action

Plaintiffs filed this action on April 25, 1980. The court granted class certification on October 13, 1981. After the Supreme Court's decision in General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982), the Board moved for decertification of the class. The court denied this motion, noting that many of the same factual issues relevant to the named plaintiffs' cases were also relevant to the class certification issue. The court advised the parties that certification of the class was conditional and subject to alteration at

any time before a final decision on the merits. Discovery continued, and trial commenced on February 8, 1984. At the close of plaintiffs' cases, the Board filed motions pursuant to Fed. R. Civ. P.41(b). These included motions (1)to dismiss the individual and class claims for failure to prove prima facie cases; (2)to dismiss plaintiffs' disparate impact claims; (3)to decertify the class action; and (4)to dismiss plaintiffs' "comparable worth" type claims.

Since Rule 41(b) gives to a court the discretion to deny a motion to dismiss for failure to prove a prima facie case, even though the motion could be granted, the court exercised this discretion and denied in its entirety the Board's motions to dismiss plaintiffs' individual and class claims for failure to make prima facie cases. However, the

court granted the Board's motion to dismiss plaintiffs' disparate impact claims on a number of grounds, including failure of proof. The court also ruled that the Ninth Circuit decision, Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), precluded plaintiffs' comparable worth claims. Finally, the court granted, in part, the Board's motion to decertify the class, thereby limiting the class to "regular teaching faculty." In granting, in part, the Board's motion to decertify the class, the court also ruled that excluded subgroups did not meet the requirements of Fed. R. Civ.P.23 and hence could not be certified as subclasses.[1]

What remains for decision are twenty-two individual disparate treatment actions, and a "pattern or

practice" disparate treatment class action composed of all female regular teaching faculty employed at .5 "full-time equivalent" (FTE) [2] or greater on or after July 21, 1979. Before evaluating and deciding these claims the court will briefly summarize the nature of the Oregon State Board of Higher Education and the eight institutions of higher education.

Oregon State Board of Higher Education

The Oregon State Board of Higher Education is a body of eleven individuals, including two students, appointed by the Governor of the State of Oregon and confirmed by the Oregon State Senate. The Board has the authority from the Oregon State Legislature to exercise a wide range of power over the State's institutions of higher education. However, the authority

is per missive rather than mandatory. The Board appoints a chancellor, who is the Board's chief executive officer. The chancellor and his staff are responsible for a wide range of administrative duties. The presidents of the eight institutions are appointed by the Board and serve at its pleasure. The presidents have been delegated full authority and responsibility for administering the affairs of the institutions, including the responsibility for making all of the personnel determinations at issue in this case.

The Board has almost no involvement in rank, pay, promotion, and tenure decisions at any institution. While the Board could retain control over these matters if it so desired, it has delegated them to the chancellor and the

presidents of the institutions. The Board sets policy and rules by which personnel decisions are made in the institutions. For example, the Board's administrative rules specify what ranks shall exist at the institutions and give general guidelines for conditions of service for faculty members. The rules also specify general guidelines for faculty evaluations. These are applied on an institutional and departmental basis in light of the institutional and departmental missions. Although the Board's rules have an impact on an individual faculty member's promotion from assistant to associate professor in that the Board has set up the rank structure and laid out a general evaluation scheme, whether an individual is discriminated against in violation of Title VII turns on decisions made or

actions taken at the institutional or departmental level.

A faculty member can appeal a non-disciplinary personnel decision to the Board, although in such a case the Board's review is not de novo. Such appeals are almost never taken. None of the named plaintiffs or class member witnesses in this case availed themselves of this appeal right.

Although the court will not detail the history and missions of the individual institutions as extensively as it could, given the massive record submitted by the Board, some brief description of the diversity of the eight institutions is necessary.

Western Oregon State College in Monmouth, Eastern Oregon State College in LaGrande, and Southern Oregon State College in Ashland were historically

teachers' colleges. At present, the education of teachers remains the primary mission at Western Oregon State College, and it is an important part of the mission of Eastern Oregon State College. Southern Oregon State College is developing into a regional undergraduate liberal arts college, as has Eastern Oregon State College to a lesser extent. The missions of these three schools is primarily education -- that is, to teach and train students. Faculty members are expected to stay current on developments in their particular disciplines. The scholarly activities or professional growth expected of faculty at these schools is designed to insure that faculty do stay current in their fields of expertise. In some departments, however, research for the sake of research may be required for increases

in salary and promotions in rank.

The University of Oregon in Eugene and Oregon State University in Corvallis are the state's two major research universities. Both institutions offer a wide range of undergraduate and graduate programs, although the institutions have different subject matter emphases. Research and publication are important parts of a faculty member's work at these institutions. The extent and quality of research and publication are major determinants in employment decisions made at the University of Oregon and Oregon State University.

Portland State University in Portland is a hybrid between a regional undergraduate liberal arts college and a major research university. It originated after World War II to provide educational opportunities to returning

veterans. Portland State University has grown into the state's "urban" university. Since the early 1970's, Portland State University has attempted to upgrade its status from a regional liberal arts college to a major research university. Faculty members are increasingly expected to have higher academic credentials and to engage in research and publication.

Oregon Institute of Technology in Klamath Falls is the state's polytechnic college. It's mission is to educate and to train students in mechanical and technological skills. Academic credentials of faculty are often valued less than relevant industrial experience. Teaching is stressed. Faculty at Oregon Institute of Technology must keep current in their areas of expertise, but do not

ordinarily engage in extensive research or publication.

The Oregon Health Sciences University in Portland is concerned with education and research in the health care area. It is a major research institution as well as a training school. Originally a part of the University of Oregon, the Oregon Health Sciences University became a university in its own right in the 1970's. Within Oregon Health Sciences University are three relatively autonomous and separate schools: the School of Medicine, the School of Dentistry, and the School of Nursing. The faculty at Oregon Health Sciences University are more heterogenous than the faculty at the other institutions. Some faculty members are exclusively researchers and are valued substantially for their ability to obtain research

grant funds from outside the institution. Others are teachers and practitioners, earning part of their salary from their medical, dental, or nursing practices. Some are primarily teachers doing little or no research or practice. All must remain current in their field of expertise.

The diversity among the institutions is obvious. The institutions are geographically removed from one another and have distinct missions and functions. The Board's decision to delegate substantial authority to the institutions is reasonable. With respect to the employment decisions at issue in this case, the institutions are in a better position than the Board to determine how well an individual is contributing to the particular mission of that institution.

The court will now consider the rules of law applicable to the named plaintiffs' claims.

Introduction Footnotes

1. Even if the class as originally certified remained involved in this decision, the result in the class claim would not be different.

2. The FTE of an academic position in the Oregon system represents the extent to which a position is full-time or part- time. For example, a position with a FTE of .75 is a "three-quarter time" position.

LAW APPLICABLE TO THE NAMED PLAINTIFFS' CLAIMS

The method of analyzing an individual disparate treatment claim is set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a Title VII case involving racial discrimination in hiring. The Court states that the first step a plaintiff must take is to make a prima facie showing of discrimination:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing
>
> (i) that he belongs to a racial minority;
> (ii) that he applied for and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. McDonnell Douglas is a hiring case, but the Court indicates that the same sort of process should be used in determining whether a prima facie case has been made when other employment decisions are involved. See, e.g., Lynn v. Regents of the University of California, 656 F. 2d 1337 (9th Cir. 1981), cert denied 459 U.S. 823 (1982).

In this case, the McDonnell Douglas formula requires each named plaintiff to prove that (1) she is qualified for a "better" employment condition (more pay, a promotion, etc.), (2)she is not getting the better employment condition, and (3)others of similar qualifications are getting the "better" condition. The burden of establishing a prima facie case of disparate treatment is not onerous. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

When a prima facie case has been established by a plaintiff, an inference arises that the employer unlawfully discriminated against the plaintiff; if the employer at this point does no more, the plaintiff will prevail. Id. at 254. The employer must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. Later cases have indicated that this language means what it literally says; that is, the employer need not persuade the court at this time that its decision was based on legitimate, non-discriminatory grounds; it must only produce evidence of legitimate, nondiscriminatory reasons for its actions:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. See [Board of Trustees v. Sweeney, 439 U.S. 24, 25]. It is sufficient

> if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Burdine, 450 U.S. at 254-55.

If the employer is able to articulate some legitimate, non-discriminatory reasons for its actions, a plaintiff may still prevail by showing that the defendant's stated reasons are in fact pretextual. McDonnell Douglas, 411 U.S. at 806. In this last stage,

> plaintiff retains the burden of persuasion. She must now have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256. Pretext may be proved in many ways. A plaintiff may

show that a seemingly legitimate, non-discriminatory criterion is in fact applied only in cases involving members of protected classes. Evidence of a defendant's general policy and practice with respect to members of protected classes may show pretext. A plaintiff may also show that a defendant's purported reasons were not advanced until after the fact.

The three-step approach outlined above is a procedural method of arriving at the ultimate factual question: Did an employer treat an employee less well than other employees because of discrimination. The Supreme Court recently reaffirmed this approach, indicating that where, as here, a defendant has failed to persuade the court to dismiss the action for lack of a prima facie case and where, as here, a

defendant has responded to plaintiff's attempt to establish a prima facie case by presenting evidence of why plaintiff was treated differently, the McDonnell Douglas/Burdine scheme need not be applied rigidly because the court has all of the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff.

> But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption "drops from the case," 450 U.S., at 255, n. 10, and "the factual inquiry proceeds to a new level of specificity."
> . . .
>
> The "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." Burdine, supra, at 253. In other words, is "the employer . .

> . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), quoting Teamsters v. United States, 431 U.S. 324, 335, n. 15 (1977). The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco, supra, at 577. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715-16 (1983).

In every individual case presented to the court by the plaintiffs, the Board has come forward with evidence

purporting to show that differences in treatment between female plaintiffs and their male comparators are due to legitimate, non-discriminatory reasons. Whether the court thinks of the issue in terms of whether the proffered reasons are pretextual (McDonnell Douglas Burdine), or examines the evidence in light of the ultimate issue of whether the Board intentionally discriminated against the individual plaintiff because of her sex (United States Postal Service Board of Governors v. Aiken), the underlying factual issue is the same: Which explanation of the Board's actions does the court believe?

Before proceeding to the named plaintiffs' claims, the court will address the issue of the statute of limitations and the "continuing violation" rule.

The Statute of Limitations and the "Continuing Violation" Rule

For purposes of the class claim and the intervenor plaintiffs who did not file charges with the EEOC or the Oregon Bureau of Labor, the present lawsuit only involves allegedly discriminatory actions occurring after July 21, 1979. See Order of December 16, 1981. The federal statute does, however, allow a court to award back pay to a plaintiff for two years prior to the time of the filing with the Equal Employment Opportunity Commissioner (EEOC) if the plaintiff prevails.

The Board contends that it cannot be held liable for illegal discriminatory actions that took place prior to July 21, 1979, because such actions are time-barred. The Board relies on Delaware State College v. Ricks, 449 U.S. 250

(1980), and United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). Evans involves a woman who failed to file a charge with the EEOC after a discriminatory discharge. Some years later she was rehired, but under the terms of the collective bargaining agreement she received no seniority credit for her pre-discharge work. The issue was whether the employer was committing a second Title VII violation by not crediting her for her prior work. The Court answered in the negative:

> Respondent [the woman] is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United [the employer] was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by Sec. 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may

constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation. 431 U.S. at 558 (footnote omitted). (emphasis in original).

In Ricks, 449 U.S. at 252, a black man from Liberia alleged that he was denied tenure because of his national origin; however, he did not file a charge with the EEOC within the statutory time period after notification

of the tenure denial. Because of the denial of tenure, he was given a one-year terminal contract and, upon the contract's expiration, he was terminated. He then timely filed a charge with the EEOC. The court held, however, that his complaint was time-barred:

> Determining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the "unlawful employment practice" of which he complains. Ricks now insists that discrimination motivat[ed] the College not only in denying him tenure, but also in terminating his employment on June 30, 1975. Tr. of Oral Arg. 25, 26, 31-32. In effect, he is claiming a "continuing violation" of the civil rights laws with the result that the limitations periods did not commence to run until his 1-year "terminal" contract expired. This argument cannot be squared with the allegations of the complaint. Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the

time of, the actual termination of his employment. But the complaint alleges no such facts.

Indeed, the contrary is true. It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure. In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. Rather, in accord with the College's practice, Ricks was offered a 1-year "terminal" contract, with explicit notice that his employment would end upon its expiration.

In sum, the only alleged discrimination occurred-- and the filing limitations periods therefore commenced-- at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure--the eventual loss of a teaching position--did not occur until later. The Court of Appeals for the Ninth Circuit correctly held, in a similar tenure case, that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences

> of the acts became most painful." It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." The emphasis is not upon the effects of earlier employment decisions; rather, it "is [upon] whether any present violation exists."

449 U.S. at 257-58 (footnote, citations omitted). (emphasis in original).

The issue is how to distinguish between a continuing violation and the continuing effects of a past, time-barred violation. For example, if a plaintiff was hired at a discriminatorily low salary in 1 5 and did not file an EEOC charge, it may well be that her pay will be lower than equally qualified males performing substantially the same job as she performs in the relevant time period. The Board argues that if each year her salary is set according to a formula (such as an across-the-board

percentage increase) applied nondiscriminatorily in each year,[1] then no continuing violation exists in the later years, and hence that her salary claims for those later years are not actionable. However, the evidence in this case does not support such a simple hypothetical. The evidence shows that, although a faculty member's starting salary and across-the-board increases are important, equity and merit raises also cause significant adjustments in salary level. It follows that, in any given year, if a male and a female faculty member are equally qualified in every relevant respect and are performing substantially similar work, then it is a present violation of Title VII for the institution to pay the woman less than the man. See Lamphere v. Brown University, 685 F.2d 743, 747 (1st Cir.

1982).

Rank and tenure matters are different. Unlike salary evaluations, which the evidence indicates occur annually, promotion or tenure evaluations and decisions are made at discreet, infrequent points in time at most institutions. For example, if prior to 1972 (when Title VII became applicable to the Board) or prior to the limitations period, the Board discriminated against women in promotions, and if after either period the Board made promotion decisions in an entirely nondiscriminatory way, plaintiffs' statistics would still show rank distributions adverse to women. Plaintiffs seem to argue that the Board is violating Title VII by not rearranging present rank distributions at the institutions to reflect the rank distributions as they would have been

had discrimination never occurred. However, rank distributions which are adverse to women and which are caused by time-barred discriminatory decisions rather than by an ongoing pattern or practice of discrimination are not actionable in this case. Even the cases relied upon by plaintiffs support this view. In Reed v. Lockheed Aircraft, 613 F.2d 757 (9th Cir. 1980), quoted extensively by plaintiffs in their trial memo, the Ninth Circuit emphasized the distinction made above:

> For the purposes of this action, then, the critical question is whether Lockheed, within 300 days of Reed's filing her charge, engaged in the unlawful conduct of failing to promote women in situations where men would be promoted. The Evans decision held merely that continuing impact from past violations is not actionable. Continuing violations are.

Id. at 760. (emphasis in original). This same distinction was expressed by

the court in another case relied upon by plaintiffs, Williams v. Owens-Illinois, 665 F.2d 918 (9th Cir. 1982), cert. denied 459 U.S. 971 (1982):

> . . . the relevant strain of continuing violation doctrine is that a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. Id at 585-86. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions. A minority employee who is not promoted in 1973, for example, and is subject to a continuing policy against promotion of minorities, may then file a timely charge in 1976, because the policy against promoting him or her continued to violate the employee's rights up to the time the charge was filed.
>
> . . .
>
> The trial court erred, however, in concluding that the continuing violations doctrine did not apply to discriminatory placements or denials of promotions. It should not have

> barred consideration of such events that may have occurred prior to the limitations period. The reason is that appellants were entitled to base claims on such discriminatory acts if they could show that these acts continued as violations because the supporting discriminatory policy carried forward into the limitations period and had its effect on employees. This opportunity to prove a continuing violation must be provided, of course, whether the claim is race or gender discrimination.

665 F.2d at 924, (emphasis added).

As to promotion and tenure, the court concludes that in order to prevail, plaintiffs must show that the Board has engaged in a continuing pattern or practice of discrimination or that the Board in individual cases acted discriminatorily against women in decisions made within the relevant time period, or that within the relevant time period women were discriminatorily not considered for promotion or tenure. It is insufficient to show only that the

rank and tenure distribution of men and women differed within the relevant time period, because that distribution may reflect decisions made before the relevant time period that are not actionable in this case.[2]

The court will now make Findings of Fact and Conclusions of Law with respect to the cases of the named plaintiffs. The court will consider the named plaintiffs in alphabetical order within each of the institutions in the following order: Eastern Oregon State College, Western Oregon State College, Southern Oregon State College, Oregon Institute of Technology, Portland State University, University of Oregon, Oregon State University, and Oregon Health Sciences University.

Individual Claims Footnotes

1. The court has ruled in its Opinion and Orders of August 10, 1984 and September 13, 1984 that the across-the-board percentage raise system, to the extent it exists in the Oregon State System of Higher Education, has not been proved by plain tiffs to constitute a violation of TitleVII under a disparate impact theory.

2. It does not appear from the evidence that the overall pattern of tenure or promotion decisions changed drastically on July 21, 1979; hence, plaintiffs' "snapshot" regression analyses of rank and tenure distribution are relevant.

EASTERN OREGON STATE COLLEGE

LAGRANDE, OREGON

Dr. Mary H. Davison

Carol E. Rathe

DR. MARY H. DAVISON

Dr. Mary H. Davison, a professor of history at Eastern Oregon State College (EOSC), claims that she was discriminated against because of her sex in that she was denied sabbatical leaves in 1979 and in 1981. Dr. Davison intervened in this action as a named plaintiff without filing a charge of discrimination with the Equal Employment Opportunity Commission.

Dr. Davison was first employed at EOSC in 1957. At that time she had three degrees, all from the University of California, Los Angeles: a B.A. degree obtained in 1947; an M.A. degree obtained in 1949; and a Ph.D. degree obtained in 1953. From 1951 to 1956 she served as an Information and Education Officer in the United States Air Force.

In 1956, just prior to coming to EOSC, she was employed by the Seattle Public School System.

Dr. Davison has administrative as well as teaching talents and skills. Prior to 1974 she served as director of the General Studies Program, and thereafter, and until 1979, she was chair of the Social Science in Business Division. In 1969 she was responsible for a workshop in social science held on the EOSC campus, and in 1979 she received a monetary award from the Freedom Foundation for excellence in economic education. She has also received other local appointments and honors.

SABBATICAL LEAVE CLAIM - 1979

Sometime in 1977 or 1978, after deciding to give up her administrative responsibilities and to return to full-

time teaching, Dr. Davison applied for a sabbatical leave for the spring term of 1979.[1] A sabbatical leave is an educational leave, ordinarily with all or a portion of salary continuing to be paid, the purpose of which is to allow faculty members to do additional research, reading, writing, traveling, curriculum planning, etc. Sabbatical leaves must be approved at the institutional level and ultimately by the chancellor of the Oregon State System of Higher Education. Sabbatical leaves always have budgetary and planning implications.

Unlike most sabbatical leaves, Dr. Davison's sabbatical leave was a negotiated leave. Dr. Davison wanted to take a one- term sabbatical leave because one-term sabbatical leaves were taken with full pay. EOSC President

Rodney Briggs, for budgetary reasons, wanted Dr. Davison to take a full year sabbatical leave because full year sabbatical leaves were leaves with half pay.

It was finally agreed that President Briggs would recommend to the chancellor a one-term sabbatical leave with full pay for Dr. Davison. This recommendation was approved by the chancellor in early 1978 to take effect in the spring of 1979. Unfortunately, the budget for the spring of 1979 had not yet been finalized when this recommendation was approved. This portion of Dr. Davison's sex discrimination claim arises out of the budget "crunch" that befell EOSC shortly thereafter.

Budget problems at EOSC of heretofore unknown dimensions resulted in a series of faculty terminations

(including some tenured faculty) in June, 1978. As a result, Dr. Briggs again asked Dr. Davison to take a full year's sabbatical with half pay. (EOSC would save one-half of a twelve month salary; Dr. Davison would lose one-half of a twelve month salary) instead of the one-term sabbatical (EOSC would not save any salary; Dr. Davison would not lose any salary) which had been agreed upon and approved. Talks - sometimes heated talks - between Dr. Briggs and Dr. Davison continued. A compromise, suggested by Dr. Davison, was finally wrought: Dr. Davison would take a one-term sabbatical leave without pay (EOSC would save one-third of a nine-month salary; Dr. Davison would lose three months' salary).[2] Dr. Davison testified as follows:

Q (by Mr. Casby) Now, is it not true that in June 1978 there were a series of terminations of faculty, some including a tenured faculty at Eastern Oregon and responsive program reduction?

A Yes.

Q And is it not true that you're -- the rescinding of the sabbatical which had already been approved by Dr. Briggs was in response to the needs created by the budget reduction and by the program reduction?

A Well, he told me he would enjoy using my salary, yes.

Q Was there not a reduction within the history area where you were?

A One member was dropped, yes.

Q And that's the area where you do teach; is that not so?

A That's correct.

Q So instead, as I understand your affidavit, what you got or used was a leave without pay for a quarter?

A Correct.

Q And the difference in terms of your salary is that whereas

in the quarter sabbatical you would be paid full salary, under the leave without pay, you were not paid anything in terms of salary for that quarter; is that so?

A That's correct.

Q Now is it not correct that the leave without pay was your idea?

A I would suggest it perhaps was.

Q And the result was that you used the time that you would have used for your sabbatical in connection with the leave without pay?

A That's correct.

Q And you had an option at that time to take a full year's sabbatical or to do as you had also suggested, take the quarter leave without pay?

A Correct.

(Tr. 8469-8471).

Dr. Davison claims that male faculty members were allowed regular sabbatical leaves during that same period of time. The faculty members who were allowed

sabbatical leaves during or near the time that Dr. Davison took her leave without pay in the spring of 1979 are listed as follows in Def. Ex. 6311:

Howard Anderson:
6/15/79-9/15/79 Sabbatical
Lois Barry:
12/16/78-6/15/79 Sabbatical
Mary Davison
3/16/79-6/15/79 Leave Without Pay
Conrade Head:
9/16/78-6/15/79 Sabbatical
Leen Inghels:
9/16/78-6/15/79 Sabbatical
Lee Insko:
3/16/79-6/15/79 Sabbatical
Dwight Lippe:
3/15/79-6/16/79 Sabbatical
Mary Jane Loso:
7/1/78-7/1/79 Sabbatical
Lyle Schwarz:
3/16/79-6/15/79 Sabbatical
Felipe Veloz:
1/3/79-3/17/79 Leave from EOSC appointed at Guadalajara, Mexico.

The court has no substantial evidence regarding the circumstances of these individuals or their sabbatical leaves, but it is clear that two of those who received sabbatical leaves are women - Lois Barry and Mary Jane Loso.

The factual issue is: Was Dr. Davison discriminated against because of her sex in 1978-79 with regard to her request for sabbatical leave? The answer is, No. Dr. Davison was a long-time respected EOSC administrator and teacher whose plans for a sabbatical leave in 1979 were partially aborted by the State of Oregon's economic problems. In a spirit of compromise, she and EOSC worked out their differences. Dr. Davison cannot prevail upon her first claim.

SABBATICAL LEAVE CLAIM - 1981

In 1980 Dr. Davison again applied for a one-term sabbatical leave for the period of time between September 15, 1981 and January 1, 1982. She wished to update and do some additional research and reading for a variety of courses which she was teaching.

Before that application was acted upon, Dean of Academic Affairs, David Gilbert, issued a memorandum on March 6, 1981, advising deans of the two schools at EOSC as follows: (a)all requests for sabbatical leaves shall go through the personnel committee, and (b)sabbatical leaves of one or two terms are "discouraged," but "schedule-outs" may be granted in lieu of sabbatical leaves of one or two terms. Dr. Davison testified as to what a "schedule-out" means.

> Q (by Mr.Casby) So that when you get scheduled out, I wonder if you could describe to us what that means?
>
> A Well, it relieved me of formal teaching assignments. It did not relieve me of the responsibility of being on campus periodically, and it did not relieve me of responsibility to students that I advise or might have continuation of work with through reading and conference.

(Tr. 8473).

Dr. Davison's request for a one-term sabbatical was denied, but she was offered a "schedule-out" with full pay pursuant to Dr. Gilbert's new policy. She accepted the "schedule-out" for fall term 1981. That "schedule-out" did not affect Dr. Davison's right to apply for a full 12-month sabbatical leave later if she chose. During this one-term "schedule-out," Dr. Davison did not teach; she had six consecutive weeks for travel; she completed the work she had intended to complete when she sought the sabbatical leave; and she received full pay. She did, however, continue student advising and committee work during this time.

Dr. Davison claims she was discriminated against because of her sex in that the next year, Ray Stinnett, a

male, was granted a one-term "schedule-out" and a two-term sabbatical leave, contrary to the March 6, 1981 policy statement of Dean Gilbert. The evidence before the court regarding Dr. Stinnett is sketchy and con fusing. On direct examination Dr. Gilbert testified as follows:

> Q (by Mr. Casby) Were any men treated differently after that period of time?
>
> A In one case we okayed a two-term sabbatical for a male, but we were able to couple with it the ability the first term, fall term to schedule out fall term and then followed by a two-term sabbatical which really amounted to a full year sabbatical, so in that case we made an exception and that had to do with that faculty member needing at a very tight time frame to get licensure. He made a very strong argument that it was then or never, and it was a case that we talked about earlier, Dr. Stinnett was under litigation and -- and it was an attempt by the institution to bring him up to speed.

Q With that exception, were there any -- well, were there any other exceptions since that one?

A No.

(Tr. 13,148).

On cross-examination Dr. Gilbert testified as follows:

Q (by Mr. Willner) Are you saying Dr. Stinnett negotiated better than Mary Davison? Is that what you're saying?

A There is no relationship whatsoever. We were dealing with a -- with a very serious personnel issue involved with litigation and some other things and in Mary Davison's case we were not dealing with a serious personnel issue nor were we dealing with litigation.

Q All right. Would she have done better if she'd sued you?

A Who knows.

Q Is the basis upon which Eastern Oregon State College makes recommendations on sabbatical to the chancellor based on how strong a faculty member negotiates or is it

based on some kind of standard universally applied to all faculty members.

A You're taking an extreme exception. We hardly ever negotiate with faculty members on sabbaticals. It's a rare -- it's a rare thing. It does happen sometimes when there's a budget problem or if we don't believe that the request for the sabbatical is appropriate for some other reason, then there certainly are discussions.

(Tr. 13,335).

On redirect examination Dr. Gilbert testified as follows:

Q (by Mr. Casby) I'd, just to be sure I understand, so the record's clear, I'd like you to describe to us whether or not there is any comparison in the considerations that led to Dr. Stinnett getting the two terms of sabbatical in 1983-84 and Dr. Davison getting a schedule out rather than a one-term sabbatical in 1982?

A Is there any comparison?

Q Yes.

A Not at all.

Q And would you explain your answer, please?

A We -- we had very, very different circumstances. Dr. Davison was requesting a one-term sabbatical to work on some courses and it was suggested to her that a schedule-out would be much more appropriate and there was a discussion about how that would finally work, what she would do during the schedule-out, what she would not do and it was approved.

And in Dr. Stinnett's situation we were dealing with a very serious personnel issue. And we needed -- we and he needed to get some licensure and some updating and so on and so forth.

Q I guess that really doesn't hit the point that I was thinking about and that is why, then, does he get what Dr. Davison got but then an additional two-term sabbatical?

First of all, did she apply for that?

A Say that again.

Q Did she apply for that?

A Did she apply for that, no.

Q What Dr. Stinnett got.

A No, not at all. She applied for a one-term sabbatical and then there were subsequent discussions with either Dr. Young or Dr. Cobb or perhaps both.

Q Okay. Then comparing the two at that time, why does Dr. Stinnett get the two-term sabbatical and Dr. Davison not? In addition to the fact that she did not apply for it.

A Well, we -- we would have been very happy to give Dr. Stinnett a three-term sabbatical. That's what we wanted to do. That's what he wanted to do. That's what he asked for.

Q In other words, a full year?

A A full year. The problem was he didn't qualify 2 until winter term. So what we did was in effect give him a three-term sabbatical by -- in fact, it was a very unique kind of schedule-out because it cost us some money. We had to hire a replacement in effect because it was very much to our advantage to have him gone that particular year.

Now, if we had waited until the following year he would have qualified for a

> three-term sabbatical, but because of the unusual nature of the personnel situation, we needed to have him go three terms at that time because he had advised us that the rules were changing in terms of the licensure issue and that this was really the last practical chance to - he'd have licensure so we were under a very extraordinary situation.
>
> We didn't like it at all.

(Tr. 13,373-375)

It appears to the court that EOSC and Dr. Stinnett were involved in litigation between each other; that Dr. Stinnett had a "licensure" problem and needed to be "updated"; and that the college needed to allow him to take three terms away from the college in order to resolve these problems. If Dr. Stinnett had been entitled to a three-term sabbatical, there would be no issue in this case. He would have taken the three-term sabbatical which would have

been in compliance with Dr. Gilbert's letter of March 6, 1981. Since Dr. Stinnett was not entitled to a three-term sabbatical, the college decided to allow him to take a one- term "schedule-out" and a two term sabbatical, for which he was eligible, but which was "discouraged" by the memorandum of March 6, 1981.

The issues are: (1) Was Dr. Davison, because she was a woman, required to take a schedule-out in September, 1981, when she requested and was eligible for a one-term sabbatical leave? (2) Was Dr. Stinnett, because he was a man, allowed to take a two-term sabbatical leave when the March 8, 1981 letter strongly urged that two-term sabbatical leaves not be allowed?

The answer is "no" to both questions. Dr. Davison was a long-time

respected EOSC member and teacher whose plans for a one-term sabbatical in 1981 conflicted with a new policy advising against one-term sabbaticals. This new plan was based upon budgetary considerations and the desire of the administration that faculty members leave the Eastern Oregon environment during their sabbatical leaves.[3] Dr. Davison was not denied a one-term sabbatical leave because she is a woman. On the other hand, Dr. Stinnett was an EOSC staff member who had problems (the need for immediate licensure) and who "caused" problems (apparently he had sued EOSC). In order to resolve Dr. Stinnett's problems and their own problems, EOSC administrators "waived" the March 8, 1981 rule. As a personnel decision, the "waiver" may have been a good decision. As a personnel decision,

it may have been a bad decision. But whatever it was, it was not a decision based upon the fact that Dr. Stinnett is a man.

Dr. Davison cannot prevail on her second claim of discrimination.

Davison Footnotes

1. There are two basic requirements set out in the Oregon Administrative rules for sabbatical leave. First, the applicant must show that he or she is "capable of using [the sabbatical period] in a manner which will provide greater service to the institution and to the state." OAR 580-21-200(1). Second, a faculty member is ordinarily only eligible for sabbatical leave after completion of a specified number of years of service, usually six continuous full-time years at the rank of instructor or above. OAR 580-21-205.

2. Part of the deal negotiated between EOSC and Dr. Davison involved the timing of Dr. Davison's change from an administrative to a teaching position. By having the change take place before the proposed sabbatical leave, Dr. Davison's salary during the sabbatical leave would be a nine-month salary rather than the twelve-month salary she had received as an administrator.

3. Different and broader cultural and intellectual opportunities are afforded faculty members when they leave the environment of their own campus and study or travel elsewhere. A change of environment is often precluded by a one-term sabbatical leave.

CAROL E. RATHE

Carol E. Rathe, a music teacher in the Lincoln County Public Schools, Waldport, Oregon, claims that she was discriminated against on the basis of her sex while serving as a teacher in the Music Department at Eastern Oregon State College (EOSC) in that (1) she was terminated from a tenured position and then hired back on a part-time basis, while non-tenured men were not terminated; and (2) while serving as a part-time, non-tenured faculty member, she was not allowed to serve on faculty committees or advise students, while men in the same position were allowed to serve on faculty committees and to advise students; and (3) after she was terminated from a tenured position, she was required to work .65 FTE while being paid as if she worked .35 FTE. Ms.

Rathe intervened in this action as a named plaintiff without filing a charge of discrimination with the Equal Opportunity Commission.

Ms. Rathe received a B.F.A. degree and a Masters degree in music from Kearney State College, Nebraska, in 1956 and 1957, respectively. In lieu of a thesis or of a musical performance, she satisfied the degree requirements by taking extra courses in education. She then taught music in the Nebraska Public Schools for several years before coming to EOSC as a part-time instructor in 1961. In 1962 Ms. Rathe became a full-time faculty member. In 1964 she was promoted to assistant professor and granted tenure. In 1972 she was promoted to associate professor.

Ms. Rathe's work at EOSC was divided primarily into two parts: (1)she taught

music education courses to elementary education majors and to music majors, and (2)she taught in the campus laboratory school -- an elementary school in which EOSC students who were preparing to become elementary teachers could do practice teaching. From time to time, however, she taught a performance course for the recorder (a flute-type instrument) and some non-education music courses.

Ms. Rathe was an able teacher and a hard worker. No contention has been made that merit played any part in her termination. In fact, she received special recognition for her work at the campus laboratory school. She was, however, not a music performer, and she did not do research.

MS. RATHE'S CLAIM OF SEX DISCRIMINATION IN HER TERMINATION FROM TENURED POSITION

In the mid- to late-1970's a financial "crunch" left EOSC with a $58,000 deficit in its budget. President David Gilbert testified as to the reasons for the budgetary problems:

> A . . . One major [factor] had to do with the under funding of both academic and classified salaries by the State Legislature. That is to say, we were told to give a certain percentage raise, and then as I recall, the amount of money we were given to do that raise was, in the case of academic employees, one percent less; in the case of classified, I think it was two percent, something like that.
>
> That was one major factor that -- the theory that the Legislature operated under is that there would be sufficient turnover and so on and so forth to absorb that.
>
> In the case of a small institution like ours, when we're dealing with small numbers, those kind of statistical averages and so forth don't necessarily happen.
>
> That situation was alleviated a little bit. In addition, we

had been given a new mission [by the Legislative Assembly] some resources internally. That was another aspect of it. In any event, we came up approximately $58,000 short in our needs and our resources.

(Tr. 13,077-78).

On May 17, 1978, then-President Rodney Briggs informed the faculty of the budgetary crisis and advised the faculty that EOSC would have to reduce or eliminate some of its programs. The faculty, through various committees, became involved in determining which programs (as opposed to which people) could be reduced or eliminated. President Gilbert testified as to the extent of faculty involvement as follows:

Q (by Mr. Casby) Dr. Gilbert, you talked about a process, and I'd ask you how that process went and what its objectives were to the extent you are able to describe that.

A The process was, as I said before, started with

> consultation with the advisory committee to the president, which is an elected committee, then moved to the educational policy and curriculum committee to identify finally or to get concurrence from the committee on the identification of programs, not individuals, which might be reduced; moved on to the personnel committee to discuss personnel consequences; finally culminated in a series of meeting with -- meetings with administrators, including the division heads, the academic dean or the dean of academic affairs, and others, which finally crystallized in the president's mind those programs to be reduced; and then finally the -- one of the last sessions had to do with the identification of individuals within programs to be reduced.

(Tr. 13,086).

Ms.Rathe does not challenge the procedures followed by EOSC during the program reduction process, nor could she. The record reflects that EOSC administrators painstakingly followed the Oregon Administrative Rules in

determining what programs were to be reduced or eliminated.

In June, 1978, Ms. Rathe and three others, an untenured man in the History Department, a tenured man in the Psychology Department, and a tenured man denominated "media specialist" (apparently without a department designation), received notices of termination to be effective in June, 1979. They were all advised of the budgetary problems of the institution and of the decision by EOSC to reduce or eliminate from the curriculum all or a part of the programs in which they were involved. All terminations were "without prejudice," a term meaning without regard to merit.

These faculty members were given the required one year notice of termination. In addition, then-President Briggs

assigned the academic dean to work with them regarding employment for the 1979-80 academic year -- retraining or relocating them or retaining them on a part-time basis.

Ms. Rathe was understandably shocked and angry. She asked the academic dean why she, rather than one of the two untenured men in the Music Department, had been selected for termination. The dean's answer was that the music education program where she taught had been selected for reduction, and it naturally followed that she was the one who had to be terminated. Ms. Rathe was not satisfied with this explanation. Ultimately the academic dean asked her to prepare a document advising him what she could do within the Music Department and suggesting how the music program could be rearranged in order that an

untenured man could be terminated instead of her.

Ms. Rathe prepared a proposal which was rejected by Dr. John Cobb, Chairman of the Music Department, for this reason: A degree program in the Music Department requires musical performance -- that is, any student who wishes to receive a degree in music must learn to perform -- to sing, to play a musical instrument, or to compose (the record is unclear whether composing qualifies as performing); the two untenured men in the Music Department are performers; they can teach students to perform (the flute, the violin, the piano, whatever their expertise); Ms. Rathe is not a performer; elementary music education, Ms. Rathe's area of expertise, is not a requirement for a degree in music; therefore, elementary music education can

be reduced without jeopardizing the music degree program.

The Dean agreed with Dr. Cobb's rejection of Ms. Rathe's plan and turned to other possibilities for employment for her. These offers were made to her at various times during the summer of 1978: (a) that she be immediately relieved of her teaching duties during the 1978-79 school year (with full pay) in order to allow her to find a job elsewhere or to be retrained; (b) that she accept a job as a full-time teacher with tenure at the laboratory school for the 1979-80 school year and thereafter; (c) that she accept a half-time position with tenure at EOSC for the 1979-80 school year and thereafter. Ms. Rathe declined all of these offers, apparently because she planned to continue her efforts to retain her former tenured position. She

filed at least five internal grievances, a grievance with the Department of Health, Education and Welfare, and a grievance with the American Association of University Professors (AAUP).

The AAUP conducted extensive hearings regarding Ms. Rathe's termination and ultimately censured EOSC. The AAUP opposed EOSC's action in meeting a budget crisis by terminating tenured faculty. The issue before this court, however, is not whether EOSC acted wisely in meeting a budget crisis by terminating tenured faculty, but only whether sex discrimination played any part in Ms. Rathe's termination.

Ultimately, Ms. Rathe remained at EOSC in a part-time position for the 1979-80 and 1980-81 school years, teaching the "bits and pieces" that were left of her program after it was

reduced. Although she implies in her testimony that she was told that all of her courses and laboratory school work were going to be eliminated after she was terminated, the evidence does not bear this out. The courses that she had taught and the laboratory school work that she had performed were reduced to the bare necessities for the teacher certification program in elementary education, but there were still necessary "bits and pieces" of her courses remaining. Originally, it had been intended that these "bits and pieces" would be absorbed by other faculty members or taught by adjunct professors whom EOSC could hire for less than Ms. Rathe.

At the time she was given the notice of termination there were four male faculty members in the Music Department:

(a)John Cobb, a tenured professor with a doctoral degree in musical arts who came to EOSC in 1960; (b)C. Robert Groth, a tenured professor with a doctoral degree in musical arts who came to EOSC in 1963; (c)James Robertson, an untenured faculty member who had an M.A. degree and who came to EOSC in 1974; and (d) Robert Klak, an untenured faculty member who had an M.A. degree and who came to EOSC in 1976. Ms. Rathe contends that, because of her sex, she was terminated rather than one of these men. However, Dr. Cobb and Dr. Groth had doctoral degrees and came to EOSC either before or shortly after Ms. Rathe. Under any criterion used for determining who would be terminated, it would be reasonable to terminate Ms. Rathe rather than either of them.

Ms. Rathe has, though, presented sufficient evidence to require the Board to come forward with a reasonable, non-pretextual basis for its termination of Ms. Rathe rather than one of the two more-recently-hired, untenured men in the Music Department.

President Gilbert testified that at the time of the termination of Ms. Rathe and the three men the primary goal was to retain degree programs -- i.e., those programs that are requirements for obtaining degrees, and that programs were identified for reduction rather than individuals identified for termination. He testified as follows:

> Q (by Mr. Casby) Now, how were the programs then identified? I realize you are saying it was programs before people, but how did the programs themselves get ----
> A There was an --
>
> Q -- picked out?

A -- analysis made of each and every position on campus ----

Q With what --

A -- with the --

Q -- considerations?

A -- idea that -- one of the major considerations was that we not lose a degree program.

Q And why was that a major consideration?

A Because of the importance that -- to -- of degree programs to meeting our objectives of educating students.

Q And what impact would loss of a degree program have on student enrollment?

A It would -- it could have a significant impact, not only in terms of enrollment but in terms of the balance of the curriculum.

Q And where does Eastern stand with respect to student enrollment in terms of --

A It's always been a very important issue for us and a problem because of our relative rural isolation.

. . .

Q And, Dr. Gilbert, in the process of identifying programs, was there

consideration of tenured versus untenured, or did that come about only -- only later?

A In -- in -- in the analysis, the initial analysis, every single position on campus was looked at. When we finally got to the point within a program of identifying individuals for reduction, then tenure became a factor. However, there was an overriding factor, which is the one that I just mentioned; that is, that we had to retain the breadth of expertise necessary to continue to offer the program. And so at least in one case, we had some -- a reasonable degree of redundancy within the faculty and the program, and we had some tenured and untenured people. And, unfortunately, from the stand point of protecting tenure, the untenured positions were necessary to continue to offer the degree program because of their expertise in their particular subdiscipline. (Tr. 13,086-88).

. . .

Q Well, then, why was it that she was -- or the program in which she served in and ultimately she, was identified for program reduction in 1978? Why did that happen?

A Well, it was a process of going through every position we had on campus, looking at programmatic needs and institutional priorities. And it was determined finally by the

president that this is a program area that we could reduce, and she was the sole occupant of -- of a position within that program, being the elementary music area.

(Tr. 13,090).

This stated policy of keeping degree programs was carried out consistently in determining which programs to reduce or eliminate and which persons to terminate. Referring to Def. Ex.6266 which is a listing of the program areas that were finally identified for program reduction, President Gilbert testified as follows:

Q [By Mr. Casby] Which one was the untenured male?

A History I.

The Court: History I. And the media specialist and the psychology, they were tenured males?

The Witness: That's correct.

The Court: And the history program was left in tact and the psychology program was left intact?

The Witness: That's correct.

The Court: But the elementary music program was eliminated?

The Witness: No, it was not.

The Court: It was not?

The Witness: It was reduced.

Q [By Mr. Casby] Now, would you explain what you mean by that because I don't comprehend that. Was there an elementary -- is there an elementary music program now?

A Yes, there is.

Q And has there been since 1978?

A Yes, there has.

Q Well, what do you mean it was reduced?

A The amount of time spent with the children in the Ackerman Laboratory School was reduced significantly. The number and range of courses that we taught were reduced to the absolute essential courses for certification.

Q What happened in psychology? Was that reduced as well?

A Well, in the sense that we had fewer faculty members to offer the broad range of courses and so there were fewer sections offered and fewer -- well, fewer sections

offered but the degree -- the degree remained. Just less flexibility.

Q And how about in history.

A The person in history was really part in history and part working with cooperative education and field placement and that again was reduction in the flexibility within the history program.

Q Just for purposes of understanding, you're now discussing history?
A That's correct.

Q Before you were discussing psychology?

A Yes, that's correct. The history program was still offered.

(Tr. 13,094-95).

The court concludes that sex discrimination played no role whatsoever in the termination of Ms. Rathe and that the reasons given by EOSC for her termination were not a pretext for discrimination.

Ms. Rathe cannot prevail on this part of her individual claim.

OTHER CLAIMS

I.

Ms. Rathe contends that she was not allowed to serve on faculty committees or to advise students during the 1979-80 and 1980-81 academic years when she served as a part-time non-tenured faculty member.

Ms. Rathe was never forbidden to serve on faculty committees or to advise students. These were responsibilities that she was no longer required to do as part of her job because there was no money to pay her for these activities. EOSC was justified in not requiring Ms. Rathe to serve on committees or advise students. There is no evidence that her responsibilities were reduced because of sex discrimination. These were budgetary decisions.

Ms. Rathe cannot prevail on her second claim.

II.

For the 1979-80 and 1980-81 academic years, Ms. Rathe was offered .35 FTE positions. She claims she was then assigned jobs which were equivalent to .65 FTE or .85 FTE positions.

Ms. Rathe was instructed to teach one three-hour course per week and to work in the laboratory school eight hours per week. Dr. Gilbert testified that the workload for which she was paid was arrived at according to the following formula:

> Q (By Mr. Casby) While you are being handed them, I'd like to ask you what the nature of your analysis was with respect to the workload that Ms.Rathe was being asked to do.
> . . .
>
> A Yes, I used the average -- the average of the faculty reports of service, which indicates that

faculty members at our institution spend, on the average, 57.9 percent of their time on instruction. We made an assumption of a 40-hour work week. 60 - 57.9 percent of 40 hours is 23.16. And we added -- so we translated the Music 383 course into -- into hours and put the 8.21 hours of Ackerman assignment along with it, and finally came up with essentially with the .35. So it's the only way I knew how to do it. It's easier if someone is teaching straight courses to do, but in this case, the Ackerman assignment's not a formal kind of assignment.

Q Now, normally -- that is to say, before the program reduction became effective, Ms.Rathe worked more than eight hours in Ackerman, did she not?

A Yes, she did.

Q And after the program reduction became effective, what was her position about how much she was being asked to work in Ackerman?

(Clerk Handing.)

A Well, she -- we told her to -- to adjust, to -- to devise a system whereby she didn't spend any more than about 8 hours. As I recall, she said she wanted to spend more time or would spend more time than that, and we tried to make it clear to her that we were only requiring that she spend a total of eight

hours with that assignment, including preparation.

Q And was there any discussion with her about her advising --

A Yes.

Q -- responsibilities?

A We tried to make it clear that we were not requiring that she advise students.

Q Okay. And why was this? Why were these restrictions, if you would, or conditions or whatever you'd call them, being placed upon her position?

A Because we didn't have the money to pay for the time to do that.

(Tr. 13,120-121)

From Dr. Gilbert's testimony the court finds that faculty members at EOSC spend an average of 57.9 percent of their time on instruction. For Ms. Rathe's three-hour teaching assignment, EOSC assumed that she would put in

$$\frac{100}{57.9} \times 3 = 5.18 \text{ hours}$$

of work for the three-hour course that she taught. She was then required to work an additional 8.12 hours per week in the campus laboratory school. Thus her total hours for each week were 13.3 hours. Basing the percentage of time (FTE) computation on a 40-hour work week, her percentage of time (FTE) should be 13.3 divided by 40. This comes out to .332, which is very close to the .35 FTE she was assigned and for which she was paid.

That Ms. Rathe may have worked longer and harder than was required by EOSC is of her own doing. There is no showing that she was required to work the hours that she chose to work or that sex discrimination played any role in this aspect of her employment.

Ms. Rathe cannot prevail on her third claim.

WESTERN OREGON STATE COLLEGE

MONMOUTH, OREGON

Dr. G. Joanne Amspoker

Dr. Anna Penk

Dr. Mary Ann Petry

DR. G. JOANNE AMSPOKER

Dr. G. Joanne Amspoker, a professor of history at Western Oregon State College (WOSC),[1] claims that she was discriminated against because of her sex in that during her entire time of employment at WOSC she has received less salary than equally-qualified males who have performed substantially the same job as she has performed. Dr. Amspoker filed a timely complaint with the Oregon Bureau of Labor, Civil Rights Division, and received a Right to Sue Letter on August 8, 1980.

Dr. Amspoker received a B.A. degree from Reed College in 1942 with a major in literature and languages, and an M.A. degree from Radcliffe College in 1946 with a major in history and a minor in government. She received a Ph.D. degree from the University of Minnesota in 1959

with a major in history and a minor in political science.

Prior to her employment at WOSC she was a teaching assistant at Reed College (one year), a history teacher at The Dalles High School (two years), a graduate teaching assistant at the University of Minnesota (two years), and an instructor, assistant professor, and associate professor at Cedar Crest College in Allentown, Pennsylvania (nine years).

Dr. Amspoker was hired at WOSC in September, 1961, as a part-time instructor in the History Department, a division of social sciences. In September, 1962, she became a full-time assistant professor, and in 1964 she was granted tenure. In 1965, Dr. Amspoker became an associate professor, and in 1975, a full professor.

Dr. Amspoker has served on these committees at WOSC: the Honors Committee; the Faculty Standards Committee; the Financial Aid Committee; the Dean's Committee to Evaluate and Reform the College Advising System; the Faculty Senate and its Faculty Evaluation Committee; and the Department of History Personnel Committee. Dr. Amspoker has been a member of the American Historical Association and the American Association of University Professors. Her evaluations by students, fellow faculty members, and WOSC administrators have been good. Her scholarly research and publication record is very limited.

Dr. Amspoker complains that three of her male colleagues in the History Department have consistently received higher salaries than she has received

from the time of their hire to the present. She contends that she is equally qualified and performs substantially the same work as they perform. Dr. Amspoker testified as follows [by affidavit]:

> "My three comparators are Hermas J. Bergman, Ross Cotroneo, and Gary Huxford. I chose Dr. Bergman as a comparator because my teaching and Dr. Bergman's teaching has substantially similar respect among our colleagues and students. I am above Dr. Bergman in that I have five years more service at the college than Dr. Bergman has. Since about 1979 Dr. Bergman has been dean of liberal arts and science for the college.
>
> I chose Dr. Cotroneo as a comparator because we are comparably qualified in the fields of history in which we teach. We are substantially similar in the respect with which our colleagues and students hold us for our teaching abilities. I am above Dr. Cotroneo in that I have five years more service than he has. We are substantially similar in the contributions we

> have made to the college community, except that Dr. Cotroneo since 1979, has been department chairman for several years. Dr. Cotroneo's publication record is better than mine.
>
> I chose Dr. Huxford as a comparator because Dr. Huxford and I have substantially similar respect among our colleagues and students for our teaching. Dr. Huxford was hired at OCE in 1961. He was teaching elsewhere from 1966 to 1969 and, I believe, in 1970, so his years of service on campus are fewer than mine. His publication record may be slightly above mine. Our service records have been substantially similar.

Pl. Ex. 2693, Pgs. 5, 6.

Dr. Amspoker claims that there is no legitimate reason for her comparators to receive higher salaries than she receives and that the salary difference is attributable to her sex.

A sample of the salary figures for Dr. Amspoker and her comparators from year of hire to 1980 are as follow:

Year	Amspoker	Bergman	Cotroneo	Huxford	
1961	6,250			5,800	
1966	8,800	8,850	9,500	8,850	(moved to Utah State until 1969)
1969	10,856	11,848	11,998	12,948	(returned to WOSC)
1972	12,892	13,748	13,700	14,870	
1976	19,499	20,616	19,970	20,547	
1980	23,573	25,106	25,592	25,022	

Table I

The following chart shows (1)the date of birth; (2)the year service at WOSC began; (3)the date the Ph.D. degree was received; and (4)the year of promotion to full professor of Dr. Amspoker and her comparators:

	Amspoker	Bergman	Cotroneo	Huxford
Date of Birth	1922	1926	1930	Younger than others, but date not in evidence
Year Service at WOSC began	1961	1966	1966	1961 (Gone 1966-1969)
Year Ph.D. obtained	1959	1967	1966	1963
Year Promoted to full professor	1975-76	1973-74	1974-75	1973-74

TABLE 2

Dr. Amspoker received her Ph.D. degree eight years before Dr.Bergman and seven years before Dr. Cotroneo. She has been at WOSC five years longer that both Dr. Bergman and Dr. Cotroneo. She received her Ph.D. degree four years before Dr. Huxford, and although both Dr. Amspoker and Dr. Huxford joined the faculty at WOSC in 1961, Dr. Huxford left WOSC to teach elsewhere for three years before rejoining WOSC in 1966.

The salary comparison and the comparison made of other factors known to influence salary require the Board to come for ward with legitimate, non-discriminatory reasons for the salary differences between Dr. Amspoker and Drs.Bergman, Cotroneo, and Huxford.

The Board contends that the Social Sciences Department and in particular the history section, unlike WOSC in

general, has emphasized publication and scholarly work since 1966. History section faculty must do research and write scholarly papers for publication in order to receive the types of satisfactory evaluations that lead to promotions and higher salaries, says the Board, and the differences between the salaries of Dr. Amspoker and Drs.Bergman, Cotroneo, and Huxford can be explained on the basis of publications. For example, the Board argues, Dr. Bergman has published four articles in major scholarly journals [two as book reviews], and he has presented two papers to professional organizations since 1968. Dr. Huxford has published four articles in scholarly journals, and he has presented three major papers. Dr. Cotroneo has published ten articles, plus the publication of his Ph.D.

dissertation in book form. He has also presented scholarly papers at several conferences and has been the recipient of one grant.

In order to bolster its contention that lack of publications explains Dr. Amspoker's lower salary, the Board offers the example of Dr. Samuel Anderson, who has also been held in rank because of a poor publication record. Dr. Anderson joined the faculty at WOSC in 1959 and is regarded highly as a teacher. He published one article in a scholarly journal in 1972 and several entries in the Encyclopedia Americana Annual. The publication of the 1972 article led to his promotion to full professor after eight years in the rank of associate professor. Dr. Amspoker was promoted to full professor in 1975 after ten years in the rank of associate professor. Dr.

Cotroneo testified and Dr. Amspoker agreed that lack of publications delayed her promotion, as well as Dr. Anderson's.

The Board contends that Dr. Amspoker's salary has kept pace with Dr. Anderson's salary and that any difference reflects only that (1) Dr. Anderson joined the faculty two years before Dr. Amspoker and (2) Dr. Anderson was promoted to full professor three years before Dr. Amspoker. Dr. Amspoker agrees that Dr. Anderson is an appropriate comparator, but argues that Dr. Anderson's salary, which has been consistently higher than her salary and substantially equal to the salaries of Drs. Bergman, Cotroneo, and Huxford, negates the Board's explanation that her salary has remained lower than her male

colleagues because of her poor publication record.[2]

From 1961, when Dr. Amspoker was hired, until 1983, Dr. Anderson has averaged $951 more per year than Dr. Amspoker.[3] He has received a salary substantially equal to or more than Drs. Bergman, Cotroneo, and Huxford over this same period. Dr. Amspoker contends that if publication record is the legitimate, non-discriminatory explanation for her salary being lower than the salaries of Drs. Bergman, Cotroneo, and Huxford, then Dr. Anderson's salary should have remained lower than the salaries of Drs. Bergman, Cotroneo, and Huxford.

It is true that in contrast to Drs. Bergman, Cotroneo, and Huxford, Dr. Amspoker has not published anything in <u>scholarly</u> publications. Before she came to WOSC in 1961, she published two

articles in the Cedar Crest College Bulletin, a bulletin for students and alumni of Cedar Crest College, and she prepared three one-page entries in the Encyclopedia Americana Annual, one page in each of the years 1975, 1976, and 1977.

Dr. Amspoker contends, however, that her lack of publications does not explain the salary differences. She claims the differences are explained by the attitude of Dr. Paul Griffin, chair of the Social Sciences Department from her arrival in 1961 until 1979. Dr. Amspoker testified (by affidavit) as follows:

> "I was told by Dr. Rice, President of the College in about 1975 or 1976 that Dr. Griffin was anti-feminist and that he would not recommend that a woman get a salary equal with a man.

Dr. Amspoker's testimony about Dr. Griffin's purported statement is hearsay. The credibility of the statement is further limited by the fact that it is not corroborated in any way and that from 1961 to 1980 Dr. Amspoker received percentage of salary increases substantially equal to her male colleagues. Dr. Griffin had to recommend and/or approve those percentage of salary increases. (See Def. Ex. 4286 following this page). Yet the credibility of the alleged statement is bolstered by the fact that the Board offered no evidence that Dr. Griffin did not hold this opinion and that despite the fact that her percentage of salary increases kept pace, her salary remained below her male colleagues and admittedly unexplainably low.

On January 29, 1974, the history staff wrote:

> "[W]e would urge that Dr. Amspoker be given another major increase in salary next year--at least $1,000 beyond the basic increase for all staff. This would bring her into the general area of the average salaries for associate professors in this department, certainly a minimal level for someone of her abilities and years of service.

Def. Ex. 4002E.

Table 3 p.1

SALARY COMPARISONS

WESTERN OREGON STATE COLLEGE HISTORY FACULTY

Instructor	1961	1983	Increase	%	Average Annual Increase
Amspoker	$6250	$28,348	$22,098	354%	$1,004
Anderson	$7000	$29,452	$22,452	321%	$1,021
Dortmund	$6000	$26,754	$20,754	346%	$ 943
Huxford	$5800	$30,091	$24,291	419%	$1,104

1961-63 dollar increase ★ = $89,595 ÷ 4 = $22,399

Note: The original staff with Huxford leaving in 1966 and returning in 1969.

Instructor	1966	1980	Increase	%	Average Annual Increase
Amspoker	$8800	$23,573	$14,773	168%	$1,055
Anderson	$9600	$24,490	$14,890	155%	$1,064
Bergman	$8850	$25,106	$16,256	184%	$1,161
Cotroneo	$9500	$24,692	$15,192	160%	$1,085

1966-80 dollar increase = $61,111 ÷ 4 = $15,278

Note: Bergman and Cotroneo were hired in 1966. Bergman assumed the position of Dean in 1981.

Instructor	1966	1983	Increase	%	Average Annual Increase
Amspoker	$8800	$28,348	$19,548	222%	$1,150
Anderson	$9600	$29,452	$19,852	207%	$1,168
Cotroneo	$9500	$29,879	$20,379	215%	$1,199
Dortmund	$8200	$26,754	$18,544	226%	$1,091

1966-83 dollar increase = $78,323 ÷ 4 = $19,581

Note: Bergman and Cotroneo hired in 1966. Bergman exluded because of advancement to position of Dean.

★ COURT NOTE: This must mean 1961-83.

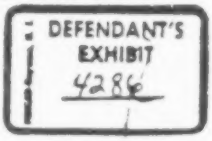

Table 3 p.2

Instructor	1966	1978	Increase	%	Average Annual Increase
Amspoker	$8800	$21,383	$12,583	143%	$1,049
Anderson	$9600	$22,216	$12,616	131%	$1,051
Bergman	$8850	$22,513	$13,663	154%	$1,139
Cotroneo	$9500	$22,105	$12,605	133%	$1,050
Dortmund	$8200	$18,824	$10,624	130%	$ 885
Huxford	$8850	$22,428	$13,578	153%	$1,132

1966-78 dollar increase = $75,669 ÷ 6 = $12,611

Note: Paul Griffin was Chair of Social Science until 1978. Cotroneo assumed the position in 1979.

Source: 1983 Faculty Data Sheet

In the 1973-74 academic year, the coordinator of the history section wrote on Dr. Amspoker's annual report for personnel file the following statement:

> "Dr. Amspoker has continued to fill with competence a key role on the history staff. Her work with the Honors Program in particular is deserving of commendation. Unfortunately, for some years, the quality of her service has not been rewarded by an equitable salary. Major efforts have been made recently by the college to correct this imbalance, but more should yet be done to bring her into line with other associate professors in the social science department.

On January 31, 1977, an evaluation by the coordinator of the history section, Dr. Cotroneo, contained this statement written to Dr. Griffin, the department chair.

> "Dr. Amspoker continues to provide the history staff with a quality performance. She is an excellent teacher,

and is highly respected by both her students and her colleagues. Her classes have remained popular with students even though her reputation as a rigorous professional is well known. Her work with the Honors program remains a good example of her on-going contribution to the history staff and to the social science department. Joanne also serves on several important campus committees, including the Faculty Senate. Serious efforts have been made in recent years to bring Joanne's salary up to that of others of the history staff of similar service, productivity, and years in rank. Joanne understands and appreciates what has been done and asks that these efforts be continued as much as possible."

On February 23, 1978, the history section coordinator, Dr. Cotroneo, wrote these statements:

"Dr. Amspoker was promoted to the rank of professor in 1975. Serious efforts have been made since that time to bring her salary up to that of <u>others on the history staff of similar service, productivity, and years in rank</u>. While funds are limited at this time, the effort to establish and

maintain a fair salary should be continued. (Emphasis added.)

Dr. Cotroneo was asked about these recommendations and statements during his testimony. He testified as follows:

> Q [By Ms. Abernethy] What if anything do you recall about the factors which led to that recommendation? [January 29, 1974 recommendation]
>
> A The history staff felt in general that they were all underpaid but that Dr. Amspoker was lower than probably normal and urged them that something be done if possible. Dr. Amspoker had for a number of years prior to this date, this is dated 1-29-74, had urged that something be done about her salary. We were complying with her request to some extent.
>
> Q Did you think she was under -- did you think she was underpaid in 1974, Dr. Cotroneo?
>
> A I have not looked specifically at that date, but I have never been of the opinion personally that she was that far out of line.

(Tr. 14,619-620).

Dr. Cotroneo explained that the recommendations he made as department coordinator on behalf of Dr. Amspoker were basically "jargon" written at the request of Dr. Amspoker. He differentiated the language used in her recommendations from those written for Dr. Huxford. He used what he called "stronger words" for Dr. Huxford -- diligent, conscientious, trusted, valuable, respected.

The issue the court must determine is whether it is true that the Social Science Department, and in particular the history section at WOSC require scholarly research and publication for promotion and pay increases or whether the requirement of publication is simply a pretext the Board has used for sex discrimination.

Dr. Cotroneo, current chair of the Department of Social Science, testified as follows:

> Q [By Ms. Abernethy] And if you know, was there any difference in your view, either from your experience as coordinator or chairperson, in the manner in which faculty persons in the Social Science Department were evaluated which differed from the manner in which they were evaluated in other departments? I guess I mean was there different emphasis given in Social Science to one kind of criteria versus another which maybe wasn't true in other departments?
>
> . . .
>
> A Yes, I think we had a more elaborate system and more difficult one for that matter for promotion and tenure.
>
> Q (By Ms. Abernethy) What do you mean by more difficult?
>
> A Well, we -- we -- especially the history staff, again, I emphasize that, we pushed for publication. It was our belief in history and it became the belief of the department itself that anyone in the social

sciences should be able to publish something beyond the Ph.D. And we felt that that was a basic guideline that we would live by. We had agreed to that much earlier and we spelled it out in detail and to my knowledge other departments use a different set of criteria.

Quite obviously in some cases publication may not be all that valuable. But we felt for ourselves, we did not try to impose this upon anyone else, but for ourselves this was something we had to do.

Q Well, why in your experience as a history professor and coordinator, does the history staff feel that publication was an important requirement in your discipline?

A Well, it's generally agreed that a historian, especially historian doing research, writing, must write something that his colleagues, his peers, would appreciate or respect as some kind of contribution in the field.

It's -- it's true, I think in most of the social sciences, and we, as I say, stress that. But especially for historians. It seems to me and it seems to the staff that this has to be done. We must prove ourselves

and write dissertation and rest on that, but we felt there needed to be some proof of ability through research, writing ability, that sort of thing.

Q In your experience at Western, do you believe that the history staff placed more importance on publication in refereed journals than was placed on refereed journals in other departments?

A Yes. Very much so. In fact, to the extent or insistence that some of our people stayed in rank longer than normal.

(Tr. 14,615-617).

Dr. Cotroneo's testimony, which the court finds to be credible, is corroborated by Dr. Amspoker, who admitted in her testimony that the delay in her promotion to full professor was attributable to her lack of publications, and Dr. Amspoker makes no legal complaint about the timing of her promotion. She admits that Dr.

Anderson's promotion was also delayed because of his publication record.

The court concludes that scholarly research and publication are important factors in promotion and salary decisions in the WOSC Social Sciences Department, and particularly in the history section of that department, and that Dr. Amspoker has no scholarly publications to her credit since coming to WOSC in 1961. This does not however, explain the Board's own evidence that Dr. Anderson, who had a publication record substantially equal to Dr. Amspoker's, did not experience the same salary depression as Dr. Amspoker. Furthermore, Dr. Anderson's experience is contrary to the Board's position throughout this case that a low starting salary limits the equity that can be maintained in salary. In Dr. Anderson's case, he

started in 1959 at $5,750 (Dr. Amspoker started in 1961 at $6,250) and remained substantially equal to male colleagues who were hired seven years later at almost twice his initial salary.

The court now turns to two other factors about Dr. Amspoker which may relate to her salary: (1) Dr. Amspoker's health and (2) Dr. Amspoker's ability to be "collegial" in an academic setting. As to Dr. Amspoker's health, Dr. Cotroneo testified as follows:

> "THE COURT: Okay. The other question I wanted to ask you was what is your understanding of the health condition of ----
>
> THE WITNESS: Dr. Amspoker?
>
> THE COURT: Yes, Dr. Amspoker. And how long has this existed?
>
> THE WITNESS: It's been a continuous thing, diabetes that has complications, and it ebbs and flows. She was in very

good health, I thought, when I first started in 1966. And then we've seen a gradual decline.

She was -- she has had major problems. Last fall, for example, she was out the entire fall because of -- of, I can't remember the diagnosis, but it has something to do with the heart. So the staff covered for her, which allowed her to receive her salary. She lost her sick leave days, but -- but much to our surprise, she seems much improved since that time, since winter -- winter quarter and spring quarter, and she's performing her duties as well as ever.

(Tr. 14,661).

As to Dr. Amspoker's ability to be collegial, Dr. Cotroneo testified as follows:

Q [By Ms. Abernethy] Is Dr. Amspoker included in that close-knit group, Dr. Cotroneo?

A As much as possible. Dr. Amspoker is difficult to work with sometimes. I think a part of that's due to her health problems. She has to have something to eat at specific times of the day and she is

notoriously brusque. We step around that. But, yes, we have tried very hard, I think, to -- to include her in the collegial relationship that we have as a history staff.

We are -- again, I repeat, we are a close-knit group and I have always felt that we have taken care of each other and that she was part of that group.

Q Did she want to be coordinator?

A I don't know. She's never expressed that to me. We don't run around the department saying I want to be coordinator so please vote for me. It's kind of a -- it was a thankless task.

I don't know if I said this yesterday: There was -- there was no stipend. There still is no stipend for the history head. There was no release time. It was a matter of assuming a responsibility that had to be done. The scheduling of classes, the organization of registration day, those kinds of things.

* * *

Q [By Mr. Willner on recross] Do the male members of the

history area go over and have coffee together every morning about ten o'clock in the college cafeteria?

A That -- no, that's not true. Dr. Bergman and myself are, I suppose, the leaders of the coffee clique, but we are always accompanied by at least one geographer. It's a social science coffee sort of thing. But we have allowed others to sit in.

Q Dr. Amspoker ever joined you?

A No, she does not.

(Tr. 14,676-677).

While lack of good health and lack of collegiality in a collegial setting could be factors in salary decisions, the Board's witnesses said they were not in Dr. Amspoker's case.

CONCLUSIONS OF THE COURT

Dr. Cotroneo is not an appropriate salary comparator for Dr. Amspoker. He is a scholar with at least ten publications. He has been an

administrative leader in his department for nearly ten years. Dr. Amspoker has no scholarly publications and she has done little or no administrative work within the Social Science Department.

Dr. Huxford is also not an appropriate salary comparator for Dr. Amspoker. Dr. Huxford's salary is higher than Dr. Amspoker's because of legitimate market considerations. In 1963, Dr. Huxford left WOSC to go to Utah State. In 1966, WOSC's enrollment was going up and the history section "induced him to come back" with a tempting salary that put him "ahead of everyone else." (Tr.14,638). He has managed to stay ahead of Dr. Amspoker because of his publication record of four scholarly articles and three scholarly papers and his greater departmental service.

As to Dr. Bergman, he certainly is not an appropriate salary comparator for Dr. Amspoker after 1981 when he became dean of the College of Liberal Arts and Sciences. His publication record is good, while Dr. Amspoker has no publication record of any substance. However, she earned a Ph.D. degree eight years before Dr. Bergman; she came to WOSC five years before he did; and the history coordinator repeatedly wrote that her salary should be brought up to the level of others with "similar service, productivity and years in rank."

The court need not determine whether Dr. Bergman is an appropriate salary comparator for Dr. Amspoker because the court finds that Dr. Anderson is an appropriate salary comparator for Dr. Amspoker. Dr. Anderson was hired at WOSC in 1959 and received his Ph.D. in 1960.

Dr. Amspoker was hired at WOSC in 1961 and received her Ph.D. in 1959. Possessing a terminal degree at the time of hire is a critical element in later salary determination. Regardless of whether the difference in Dr. Anderson and Dr. Amspoker's salary in 1961 was justified by legitimate factors (and cognizant of the fact that sex was a legitimate factor in 1961), the court finds that the two additional years of service by Dr. Anderson prior to receiving his Ph.D. degree and the three additional years that he was a full professor do not account for the 23 years that Dr. Anderson received a substantially higher salary than Dr. Amspoker. Several of the years where the salary differences between Dr. Anderson and Dr. Amspoker were highest occur prior to his promotion to full professor

and during the time when Dr. Amspoker and Dr. Anderson were both at the associate professor rank, i.e. 1968, 1969, and 1970. See infra footnote 3.

Dr. Amspoker and Dr. Anderson have performed substantially equal work throughout their careers at WOSC. The Board has failed to raise legitimate, non-discriminatory reasons to account for Dr. Anderson's substantially higher salary. It is reasonable to infer that the salary differential is attributable to sex discrimination.

Dr. Amspoker is entitled to prevail on her individual claim.

Dr. Amspoker Footnotes

1. Western Oregon State College was called Oregon College of Education until the early 1980's. The court will use the acronym WOSC for this institution throughout this opinion (including the section regarding Dr. Anna Penk), regardless of time frame.

2. Although Dr.Amspoker proposed no findings of fact as to Dr.Anderson, the court makes this comparison in response to the Board's argument that this evidence rebuts Dr.Amspoker's prima facie case.

3. Defendant's Exhibit 4287 lists the following salary levels for Dr. Anderson and Dr. Amspoker:

Year	Anderson	Amspoker	Difference
		part-	
1961	7000	6250 time	750
1962	7500	6575	925
1963	7875	7550	325
1964	8400*Assoc.		
		7550	850
1965	9200	8400* Assoc.	800
1966	9600	8800	800
1967	10416	9408	1008
1968	11184	10152	1032
1969	12217	10856	1361
1970	13010	11641	1369
1971	13540	12357	1183
1972	14082*Prof.		
		12892	1190
1973	15165	13860	1305
1974	16006	15077	929
1975	18247	17567* Prof.	680

1976	20345	19499	846
1977	21362	20474	888
1978	22216	21383	833
1979	23104	22238	866
1980	24490	23573	917

(Table continued)

1981	26547	25552	995
1982	27397	26479	918
1983	294522	83481	104

Total difference over period	$21,874
Average difference over period	$951

DR. ANNA PENK

Dr. Anna Penk, an associate professor in the mathematics section of the Natural Science and Mathematics Department of Western Oregon State College (WOSC)[1] claims that she was discriminated against because of her sex in that (1) she was placed on a fixed-term appointment in 1973 and denied a tenure track appointment until 1979; (2) she was paid less than equally qualified men who performed substantially the same job as she performed; (3) she was denied a promotion to full professor in 1983; and (4) she was required to share office space with other women faculty, while the men in her department had their own private office space. Dr. Penk filed a charge of sex discrimination with the Equal Employment Opportunity Commission

and received a Right to Sue Letter on August 8, 1980.

Dr. Penk received a B.A. degree from Whitman College in 1950; an M.A.T. degree from Reed College in 1964; and an M.A. degree and a Ph.D. degree in mathematics from the University of Oregon in 1969 and 1973, respectively. Dr. Penk taught high school at Roosevelt High School in Portland, Oregon, and at South Salem High School in Salem, Oregon, from 1963 to 1966.
Dr. Penk was first hired at WOSC winter term of 1973 as an instructor on a 12 week, fixed-term contract. At that time she did not have her doctoral degree and she had no college teaching experience. Dr. Penk and Claudia Aldrich were hired to teach some of the coursework of Dr. Wong, a tenured faculty member, who had resigned in the middle of the academic

year. Dr. Penk and Ms.Aldrich shared a .74 FTE position based on an annual salary of $9,260.

Spring term of 1973, a tenured faculty member, Janet Tillman, took a leave of absence. Dr. Penk and Ms. Aldrich were asked to teach some of her courses. Their combined FTE that term was .94. Fall term of 1973, Dr. Penk completed her Ph.D. degree and published her dissertation. After Janet Tillman's leave was extended, Dr. Penk was again hired on a 12 week, fixed-term contract, this time at .53 FTE. Since Dr. Penk had obtained her terminal degree, she was promoted to assistant professor, and her salary was increased 7%. She was also hired on 12 week, fixed-term contracts for winter and spring terms of 1974, again because Janet Tillman had extended her leave.

In July, 1974, Janet Tillman resigned. No one was hired to fill the Dr. Wong and Ms. Tillman tenure track positions. Instead, their courses were partially taught by part-time faculty (including Dr. Penk) hired on fixed-term appointments. Dr. Penk taught .73 FTE during the 1974-75 academic year (funds came from the Dennis Williams' position because Dennis Williams was on leave without pay); full time during fall term of 1975; .53 FTE winter term of 1976; .67 FTE spring term of 1976 (funds came from "institutional reserves" -- i.e. money saved when faculty took leaves without pay or sabbatical leaves); full time fall term of 1976; .73 FTE winter term of 1977; and .80 FTE for spring term of 1978 (funds came from the David Jennings' position because David Jennings was on sabbatical leave); full

time during the 1977-78 academic year (funds came from the Dr. Hubert and Dr. Green positions because Drs. Hubert and Green were on sabbatical leaves at least a portion of the time).

While Dr. Penk's 1977-78 academic year appointment was full time, fixed-term, it was denominated "renewable and "tenurable" which meant that if a tenure track position became available, Dr. Penk's service during the 1977-78 academic year would count toward tenure. The 1977-78 academic year was Dr. Penk's first full year of full-time teaching.

Effective the 1978-79 academic year, Dr. Penk was promoted to associate professor and again hired full time, fixed-term "renewable and tenurable." In December, 1978, Dr. Eastman, a tenured faculty member, resigned. In February,

1979, the Personnel Review Committee for the Mathematics Section recommended that Dr. Penk be hired in Dr. Eastman's tenure track position and be granted tenure simultaneously. Dr. Ray Broderson, Chair of the Department of Natural Science and Mathematics, and the Department Personnel Review Committee concurred. On March 28, 1979, Dr. Gerald Leinwald, then-President of WOSC, informed Dr. Penk that he would recommend she be granted indefinite tenure at 1.0 FTE to be reflected in her notice of appointment for the 1979-80 academic year. Dr. Penk accepted this offer. Beginning in the fall of 1979, Dr. Penk became a full-time associate professor of mathematics with tenure.

In 1982, after four years in the rank of associate professor, Dr. Penk applied for a promotion to full

professor. Dr. Penk was denied promotion to full professor at that time on the basis that the department wanted to see the results of her research which was in progress before promoting her.

FIXED-TERM APPOINTMENT

In her first claim of sex discrimination Dr. Penk charges that she was kept on a fixed-term appointment and denied a tenure track position from 1973 to 1979 based upon her sex. The Board's response to this charge is that between 1973 and 1979, no one was hired on a tenure track position in the Department of Natural Science and Mathematics at WOSC because of a general decline in enrollment and the subsequent loss of funds; that the tenure track positions held by Dr. Wong and Ms. Tillman, who resigned during this period, were not filled because the

department could not obtain administrative and budgetary approval to do so; and that Dr. Penk was hired without a search on the first tenure track position which became available and simultaneously granted tenure.

Dr. Penk testified as follows:

> Q [By Ms. Abernethy] So, between when you were initially hired and when you received tenure, there was nobody hired in ahead of you and put on a full-time tenure track position?
>
> A No; five faculty members, however, were given tenure during that period. (Tr. 7,212).

By her own testimony, Dr. Penk was hired on the first tenure track position which became available after she was hired as a part-time faculty member in 1973. Although tenure was granted between 1973 and 1979 to some faculty members in her department who were hired

on tenure track appointments prior to 1973, no new faculty members were hired on tenure track positions between 1973 and 1979. Furthermore, Dr. Penk was not just hired on a tenure track position in 1979 -- she was hired without a search and then simultaneously granted tenure. Ordinarily, a faculty member must have five or more years of full-time, regular employment in a tenure track position before tenure is granted. Ordinarily, a faculty member who is hired into a tenure track position must compete in a national or regional search conducted for the position. In Dr. Penk's case these requirements were waived in recognition of the accumulated 4 years of excellent service Dr. Penk had rendered as a part-time, fixed-term faculty member.

Dr. Broderson testified that he would have moved Dr. Penk from a part time, fixed-term position into a tenure track position had he been able to do so. Dr. Penk also testified to this fact:

> Q [By Mr. Willner] All right. And did you have discussions with Dr. Broderson and others about your wishes in regard to that fixed term appointment?
>
> A Yes, I did.
>
> Q And what did you ask them?
>
> A I was asking that I would be put on tenure track, especially since several people on tenure track had already resigned.
>
> It was Dr. Wong who left before I was hired, then it was Mrs. Tillman, Mr. Eastman -- Eastham, who resigned.
>
> Q All right. When you asked about being placed on tenure track, what were you told?
>
> A Mr. Main, who was the coordinator of the Mathematics Section at the time, was very sympathetic. The Mathematics Department was suffering from that. They could not plan for their curriculum, either, and

he was eager that someone be put on tenure track on a permanent basis in the department.

Since they liked me, they were pushing for me to get tenure track position. I talked to Dr. Broderson, and I asked him if there was anything ----

Q He was department chair of science above Dr. Main?

A That's correct. He told me he was doing all he could to get me a tenure track position.

(Tr. 7,157-158).

That enrollments were declining at WOSC at the time Dr. Penk was first hired is well documented (Def. Ex.8049) and undisputed. Fixed-term appointments are traditionally used more frequently during times of declining enrollment because colleges cannot guarantee funds to continue tenure track appointments. Part-time, fixed-term positions are not equivalent to tenure track positions.

No economic consequences flow from a decision to grant tenure. Economic consequences flow from a decision to denominate a position as tenure track or to place someone in a position already denominated tenure track. Flexibility to adjust the workload and to commit institutional funds is within the discretion of an institution, so long as that discretion is not used to "hide" sex discrimination. There is no evidence in this case that WOSC "froze" tenure track hiring to prevent Dr. Penk from obtaining a tenure track position because of her sex or for any other reason.

Dr. Penk was a valued faculty member whom WOSC considered itself fortunate to have on its faculty. This is reflected in a letter Dr. Broderson wrote to the dean of faculty at WOSC in December, 1976. Dr. Broderson stated to

the dean that Dr. Penk, "may be approached to teach and do research full time" at Oregon State University starting in the fall of 1977. Dr. Broderson said he would like for WOSC to be in a position to compete with Oregon State University for Dr. Penk on a full time basis. The dean of faculty wrote back to Dr. Broderson in January, 1977, stating that he had received Dr. Broderson's "signal" concerning Dr. Penk and that he sincerely hoped that WOSC would be in a competitive position the next year. The dean of faculty told Dr. Broderson to discuss his plans and needs with the president.

There is no reason to believe that Dr. Penk could have been hired <u>at all</u> during the period 1973-79, had there not been unexpected resignations and leaves of absence or sabbatical leaves. That

she was hired is attributable to the college's need and the fact that she was an eager and excellent applicant for the fixed-term, part-time positions available. The court concludes that Dr. Penk was not discriminated against because of her sex during the time she remained in a fixed-term position at WOSC. In order to prevail in an individual case, a plaintiff must prove that: (1) she is qualified for a "better" employment condition (that is, a tenure track appointment); (2) she is not getting the "better" employment condition; and (3) similarly situated "others" are getting the "better" condition. See infra at 4 - Intro - Individual Claims. Dr. Penk has not shown that anyone else was getting the "better" condition.

Dr. Penk cannot prevail on this portion of her claim.

SALARY

Dr. Penk next contends that she did not receive pay equal to that of her male colleagues because of her sex. In support of her claim, Dr. Penk presents evidence that her salary was lower than four men she considers to be "comparable" to her: Dr. Norman Nelson; Dr. Robert Main; Dr. B. Green; and Dr. Edward Wright. The salary figures for Dr. Penk and her comparators from 1977 to 1983 are as follows:

SALARY COMPARISON

Year	Penk	Nelson	Main	Green	Wright
1977	$16,200	$17,815	$18,625	$20,818	---
1978[2]	$18,099	$19,454	$20,502	$22,409	---
1979	$18,099	$19,454	$20,502	$22,409	$19,500
1980	$19,185	$20,921	$21,982	$23,754	$20,920
1981	$20,797	$22,679	$23,828	$26,035	$23,078+ 5,580
1982	$21,463	$23,405	$24,590	$26,868	$24,816+
1983	$23,073	$25,160	$26,434	$28,883	$26,677+

Pl. Ex. 209(c).

Because starting salary often influences salary levels thereafter, the court will first determine whether sex discrimination played any role in Dr. Penk's starting salary. Dr. Penk's starting salary was set by Dr. Ray Broderson in 1973 when she began as a part-time instructor sharing a .53 FTE appointment with Ms. Aldrich. Dr. Penk and Ms. Aldrich had the same annual salary of $9,260. In recommending the starting salary for Dr. Penk, Dr. Broderson wrote to the dean of faculty stating:

> Mrs. Aldrich taught successfully here in 1970-71. Her salary then was based on $9,000. Her application indicates that she taught this past summer for Chemeketa [Chemeketa Community College in Salem, Oregon] at a full time equivalent of $9,260. Her educational background is the same now as in 1970-71, suggesting we hire her at the same relative position.

> Considering the overall improvements in salary schedules and her most recent salary, I recommend Mrs.Aldrich be hired on the basis of $9,260 full time salary.
>
> In the same letter Dr. Broderson wrote, I need your advice about Mrs. Penk [at this time Dr. Penk had had no college teaching experience.] It seems to me, in comparing her qualifications to those of Mrs. Aldrich, that the two backgrounds iron out quite evenly. Mrs. Penk has somewhat less experience teaching, but more academic work -- notably she is pretty well known through her doctoral dissertation. I suggest that the salary of Mrs. Penk also be based upon a full time of $9,260.

Def. Ex. 4283.

Dr. Broderson testified that salaries are always lower for faculty who enter employment without their Ph.D. degrees and that starting salaries are often negotiable. Dr. Penk had not protested her starting salary or tried to negotiate it upward.

Dr. Nelson was hired in 1970 at a beginning salary of $ 11,142. at that time he had his doctorate, was hired as a full-time assistant professor, and had seven years of prior college teaching experience. Dr. Penk, on the other hand, had no doctorate, had no prior college teaching experience, was hired as an instructor, and was, in effect, hired as a .37 FTE employee. Dr. Main was hired full time in 1968 at a beginning salary of $ 10,116. Dr. Main had had ten years of prior public school and college level teaching, while Dr. Penk had had three years of prior public school experience. The court does not consider Dr. Green [3] to be an appropriate comparator for Dr. Penk as to beginning salaries. Dr. Wright will be discussed separately later.

The court concludes that the Board's

explanation as to how dr. Penk's starting salary was determined is reasonable and without sex bias. Nothing in the record suggests that sex was a factor in setting Dr. Penk's starting salary.

The court must now address the issue of why Dr. Penk's salary was lower than the salaries of Dr. Nelson, Dr. Main, and Dr. Green between the years 1977 and 1983 and why Dr. Penk's salary was lower than the salary of Dr. Wright between the years 1979 an 1983. Dr. Penk contends the salary differences are a result of sex discrimination. As to the salary differences between Dr. Penk and Dr. Nelson, and Dr. Green, the Board contends the salary differences are the result of (a) length of experience in teaching; (b) length and

extent of service at WOSC; and (c)length of time since obtaining a Ph.D. degree. The Board contends that as to Dr. Wright, the differences between his salary and that of Dr. Penk are explained by market factors surrounding the demand for computer program educators.

After Dr. Penk began teaching at WOSC in the fall of 1973, the administration soon learned that Dr. Penk was a talented teacher and a willing worker. She was rewarded with salary increases to reflect her contributions to WOSC. Dr. Penk received the following salary increases between August, 1973 and fall, 1977:

August, 1973	7% raise (As high as anyone at WOSC received.)
January, 1974	5% raise (In recognition of the fact that Dr.Penk had received her Ph.D.

	degree in November, 1973.)
Fall, 1974	$1000 raise (Above the average faculty increase.)
Fall, 1975	12% raise (Above the average faculty increase.)
Fall, 1976	10% raise (Above the average faculty increase.)
Fall, 1977	Another increase.

From the fall, 1977 to 1983, Dr. Penk received equal or better percentages of salary increases than Dr. Nelson, Dr. Main, and Dr. Green (Dr. Penk 42%, Dr. Nelson 41%, Dr. Main 42%, Dr. Green 39%).

The major factors which account for salary differences are set out as follows:

e	Year of Service	Year of Terminal Degree	Year of Highest Rank
k	1973	1973	Assoc/1978
son	1970	1970	Prof/1982
n	1968	1970	Prof/1977
en	1969	1969	Prof/1974

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In summary, Dr. Nelson, Dr. Main, and Dr. Green came to WOSC several years before Dr. Penk. They were hired as regular, full-time faculty members, unlike Dr. Penk. Each has had substantially more teaching experience than Dr. Penk has had. Each received his terminal degree several years before Dr. Penk. Each is a full professor. In addition, Dr. Penk received equal or better percentages of salary increases than her comparators received from 1977 to 1983. The court concludes that the higher salaries paid to Dr. Nelson, Dr. Main, and Dr. Green from 1977 to 1983 are due to legitimate, non-discriminatory factors.

While the court finds that the salaries of Dr. Nelson, Dr. Main, and Dr. Green are explained by legitimate, job-related factors, the salary of Dr.

Wright presents the court with a different situation. The circumstances of Dr. Wright's employment are these: Prior to Dr. Wright's employment, WOSC offered a very minimal computer program. In order to enlarge the computer offerings and to develop a computer program, a position was advertised seeking a person with a Ph.D. degree in computer science. Dr. Penk served on the committee which drafted the position announcement. Dr. Penk believed that the requirement of a Ph.D. degree in computer science was "too high" a requirement. When no applicants with the Ph.D. degree in computer science applied, the requirement was changed to a Ph.D. degree in computer science education or the equivalent. Dr. Penk testified as to what happened next:

After the petitions were closed

> or the time for petitions to come in closed and they found that nobody had applied with the right qualifications, then one of Dr. Main's fishing buddies who had done some computer teaching, elementary computer courses at one of the two-year community colleges, was urged to apply.

(Tr. 7,192). The person described by Dr. Penk was Dr. Wright. Dr. Penk felt that her qualifications for the position were better than Dr. Wright's but she had not applied for the position because she did not have a Ph.D. degree in computer science and was not aware that the qualification had been modified. (Tr. 7,192).

Dr. Penk explained to the court that she began to teach computer courses in 1979, the same year that she was appointed to a full-time, tenured position and the same year that Dr. Wright was hired to begin the computer

program. Her salary that year was $18,099 and his starting salary was $19,500. Dr. Wright's salary seems disproportionate to Dr. Penk's salary, and it cannot be explained by any of the factors relevant to the salaries of any of Dr. Penk's other male comparators. Dr. Wright's 1979 salary of $19,500 also seems disproportionate to the salaries of Dr. Nelson ($19,454), Dr. Main ($20,502), and Dr. Green ($22,409). For example, Dr. Main received only $1002 more in salary than Dr. Wright in 1979, although he had had ten years of prior full-time service at WOSC, and he had received his doctoral degree seven years before Dr. Wright.

To bolster her claim of sex discrimination Dr. Penk testified that three people now teach computer science offerings at WOSC: two men, Dr. Wright

and David Olson, and one woman, Dr. Penk. Dr. Penk uses Mr. Olson as an example of WOSC's alleged sexist hiring practices. Mr. Olson was hired for the 1984-85 academic year as a computer science faculty member at a salary of $23,000. Dr. Penk's salary is $23,073 for the 1984-85 academic year. Mr.Olson had been Dr. Penk's student at WOSC, where he received an M.A. degree in 1982. He taught at Wallowa High School, Wallowa, Oregon, from 1978 to 1981; at Chemeketa Community College in Salem, Oregon, and the WOSC Continuing Education Service during 1981-82; at the University of Oregon as a graduate teaching fellow in 1982-83, and at Lane Community College as a part-time teacher before being hired by WOSC.

Dr. Penk explained that when she became aware of Mr.Olson's salary she

went to see her department chair, Dr. Broderson. Dr. Penk testified as follows:

> Q [By Ms. Reynolds] All right, and what did Dr. Broderson say?
>
> A He looked very pained; he said he didn't know what to say to me because anything he would say to me would sound like empty statements.
>
> All he could say was that there was nothing he could do about it. (Tr. 21,822).

Dr. Penk then went to see Dean Bergman. She testified:

> Well he [Bergman] told me the market was such that they had to pay Mr. Olson the same salary that they were paying me. They couldn't hire him at less.

Penk continued:

> A I told him that I was teaching in the same area as-- as Mr. Olson. I was also in computer science.
>
> Q And what did the dean say then?

> A Well, he said I was hired at a time when the market didn't value that particular -- that particular talent or that particular background.

(Tr. 21,822-823).

On cross-examination, Dr. Penk testified that she was on sabbatical leave during the selection process that lead to Mr. Olson's appointment and did not participate in or gain any direct knowledge of the salary negotiations with respect to any of the candidates. Dr. Penk testified as follows:

> Q [By Mr. Casby] Are you in a position to say that Dean Bergman was wrong when he said that that was the lowest price he could hire -- if I'm -- I realize I'm characterizing what you said. But nevertheless, was he incorrect in saying that he couldn't hire him, meaning Olson, at less --
>
> * * *
>
> A I have no idea.

(Tr. 21,840-841).

Since Dr. Penk's testimony about Mr. Olson was presented during plaintiff's rebuttal case, the Board did not and could not present any testimony to explain his salary.

As to Mr.Olson, the court will consider the testimony about him as some evidence of the allegedly sexist salary practices at WOSC. The court will not consider him as a comparator for Dr. Penk. The testimony about him was offered only in plaintiff's rebuttal case without an opportunity for the Board to respond. However, Dr. Penk's own testimony shows that market factors rather than sex discrimination affected Mr.Olson's starting salary.

As to Dr. Wright, the record does not really explain Dr. Wright's starting salary. There was evidence throughout this case that the demand for computer

programmers and scientists in the private sector required the colleges and universities to pay higher salaries in this area in order to compete with this demand. The court can and does assume that market competition was a factor in setting Dr. Wright's salary, but this court does not know the extent to which this factor influenced Dr. Wright's starting salary. The only facts the court has before it are (1) that Dr. Wright was hired to perform the specialized task of organizing the computer program offerings at WOSC, and (2) that Dr. Wright was a "fishing buddy" of Dr. Main who was hired after no one with the appropriate credentials applied. The court has the vita of Dr. Wright. He appears qualified to hold the position and Dr. Penk does not contend that he is unqualified. She simply

contends that she ought to be paid as much or more than he is paid, and the reason she is not is because of sex discrimination.

The court must first determine whether Dr. Wright is an equally qualified man who performs substantially the same job as Dr. Penk. Undoubtedly, Dr. Wright and Dr. Penk can be compared as to credentials. In that category, Dr. Penk may come out ahead. Qualifications, however, are insignificant if job content differs.

There is no direct evidence before this court of sex discrimination in salary against Dr. Penk. In order to infer intent to discriminate from the existence of wage differences, Dr. Penk must show substantial equality of the work performed. Spaulding v. University of Washington, 740 F. 2d 686, 700 (9th

Cir. 1984). For the court to properly resolve a claim that certain jobs are substantially equal the court must make a case by case analysis of the actual job contents of the positions.

Unfortunately, there was very little evidence presented regarding the specific job content of Dr. Penk's and Dr. Wright's positions. In her direct testimony, Dr. Penk stated:

> Q [By Mr. Willner] All right, and what was his responsibility?
>
> A He was hired to do some work with -- to organize the computer -- the computer science offerings on our campus.

(Tr.7,173-174).

In the period following Dr. Wright's hire, Dr. Penk began to expand her own knowledge in computer science and teach computer science offerings. She testified that in the 1984-85 academic year, she was assigned to teach two-

thirds in computer science and one third in mathematics. She explained:

> Q [By Ms. Reynolds] You testified that you are teaching two-thirds in the area of computer science. What specific areas within the computer science area do you teach?
>
> A I teach just about -- I'm assigned right now programming classes. But I -- I teach, and I will be teaching all areas.
>
> Q All right. And is there a particular area in the computer science area that you have special expertise in?
>
> A Yes, my -- since my Ph.D. is mathematical logic which is very closely related field to computers, my area is in the theoretical applications and problems of computer science.
>
> Q All right. And what level courses are those?
>
> A Usually they're the 400 level courses and graduate level courses.
>
> Q And is there anyone else on campus who is qualified to teach those particular courses?
>
> A No.

(Tr.- 21,821).

Based upon the evidence in this record, the court finds that the actual job content of Dr. Penk's position and Dr. Wright's position are not substantially equal. Dr. Wright was hired to perform the specialized task of organizing and expanding what was in 1979-80 a minimal computer program. In contrast, Dr. Penk evolved as a teacher of computer courses over a period of five years to her present position teaching computer science classes two-thirds of the time and mathematics classes one-third of the time. There is no evidence in this record that Dr. Penk assumed any administrative responsibility in the computer science area. There is no evidence in this record as to what courses Dr. Wright teaches, if any. The burden to prove that these positions are substantially

equal rests with Dr. Penk. If the court were presented with adequate facts relating to the actual job content of these two positions, such as type of classes taught, number of students taught, actual administrative responsibilities performed, it may well have found that the positions are substantially equal. Resting upon the terse explanation for Dr. Wright's position presented, Dr. Penk's assertion that the positions are substantially equal must fail.

The court concludes that market factors in new hirings and different job responsibilities account for the differences between Dr. Penk's salary and the salaries of Dr. Wright and Mr.Olson. There is no direct evidence before this court of sex discrimination in salary against Dr. Penk nor is there

any evidence from which to infer sex discrimination. Dr. Penk is not entitled to prevail on her salary claim.

DENIAL OF PROMOTION

Dr. Penk next contends that she was denied promotion to full professor in 1983 based upon her sex. Dr. Penk was promoted to associate professor effective the 1978-79 academic year. After four years in the rank of associate professor, she applied for promotion to full professor. She was denied promotion to full professor at that time. Dr. Penk testified that she was told that "since [she] was on educational leave at that time and was pursuing some research, they wanted to see the results of [her] research before promoting [her]." (Tr.7,190).

The mathematics section of her department recommended Dr. Penk for

promotion to full professor in 1983. The department as well as Dr. Broderson, the department chair, recommended Dr. Penk for promotion. Dr. Penk's promotion file then went from the department to Dr. Hermas Bergman, the Dean of the School of Liberal Arts and Sciences. Dr. Bergman did not recommend promotion at that time. In a memo to President Richard Meyer, Provost James Beaird, and the Senate Personnel Review Committee, Dr. Bergman praised Dr. Penk's academic qualifications, service to students, motivation, and commitment to her profession. However, Dr. Bergman concluded as follows:

> . . . Her record of scholarly research and publication and of other professionally related services is brief but impressive. Unfortunately, that record has changed little since she was promoted to Associate Professor in 1978. In my judgment, the evidence is lacking to show that she has

> moved sufficiently beyond the professional level she had reached in 1978 to justify her being promoted to Professor at this time.

(Def. Ex.4155). The Senate Personnel Review Committee, aware of Dr. Bergman's negative recommendation but purportedly acting independently, voted to deny Dr. Penk's request for promotion. (Tr.14,405-407). This committee included both men and women, including Dr. Gloria McFadden, a class member in this case.

The Board defends this action by explaining that when Dr. Gerald Leinwald became President of WOSC in 1977 he raised the standards for achieving promotion by placing greater weight on publications and professional growth than had been done before. Professional growth includes taking additional courses, participating in conferences, and other kinds of demonstrable indicia

of professional advancement as well as actual publications.

Dr. Penk does not dispute that she has not published any research since her doctoral thesis in 1975. Dr. Penk's vita shows that she made a presentation at a mathematics colloquium at Reed College in 1980. Several other professionally related activities are listed on her vita but not dated. The court concludes that from 1978, when Dr. Penk was promoted to associate professor, to 1983, when she applied for promotion to full professor, she had only one demonstrable indication of professional growth, and that was the presentation at a mathematics colloquium at Reed College in 1980.

Dr. Penk contends that the Board's explanation is not credible because two of her male colleagues, Dr. Norman Nelson

and Dr. James A. Barnard, were promoted to full professor without having publications or professional growth. Dr. Penk claims that the emphasis on publications and professional growth was not evenly applied and is no more than a pretext for sex discrimination.

The court will review the circumstances surrounding the promotions of Drs.Nelson and Barnard. Dr. Nelson was promoted to associate professor effective the 1973-74 academic year and to full professor effective the 1982-83 academic year. At the time of his promotion to full professor, Dr. Nelson had been in the rank of associate professor for nine years. Dr. Nelson's vita (Def. Ex.4159 A) shows no publications since 1974; two presentations in 1974; some consulting

and professional services; and numerous conferences.

Dr. Barnard was promoted to associate professor effective the 1975-76 academic year and to full professor effective the 1983-84 academic year. (Tr.14,410-411). At the time of his promotion to full professor, Dr. Barnard had been in the rank of associate professor for eight years. Dr. Barnard's vita (Def. Ex.4160 D) shows several publications, but none in refereed journals; several undated, unpublished research projects; some professional service; and a representation that Dr. Barnard averages one talk per year at mathematics meetings in the Northwest.

In deciding whether to promote an individual faculty member, an institution is entitled to consider any legitimate, work-related, non-

discriminatory factors it chooses. In the academic setting, the factors ordinarily relied upon in promotion considerations are teaching, service to the institution and community, and scholarly activities -- sometimes called professional growth. The institution is free to set its own standards of achievement for promotion and thereafter to change those standards without judicial interference provided those standards are set without regard to an impermissible bias such as sex.

As to the decision not to promote Dr. Penk, Dr. Bergman testified as follows:

> Q [By Ms.Abernethy] What was your recommendation in Dr. Penk's case?
>
> A My recommendation was that Dr. Penk not be awarded the rank of full professor at that time.
>
> Q What were your reasons for that recommendation?

A My reasons were based on the fact that there had not been or there was not in the file any evidence of scholarly research or publication during the period since she had been promoted to associate professor.

Q When you say scholarly research, are you referring to something besides publications?

A We are not adamant that research must be published.

Q When you say "we" you mean Western Oregon State College?

A The college, that's right. We-- if evidence can be shown that there has been substantial research, even if it has not been published yet, we take that into consideration.

Q What do you mean when you say you saw no evidence of scholarly research and/or publications?

A Nothing in the vita indicated that either was going on or had taken place during that period of time.

Q Well, why is that evidence important to you in reviewing promotion applications?

A We have several criteria for promotion. These are spelled out in various documents that have been presented to the court. They

include teaching, they include service to the institution, service to the community, service to the profession and they include also scholarly development or professional development might be a better term.

I don't want to overuse the word scholarly because, as an institution that emphasizes teaching, we do not put as much stress on research and publication as the universities do, for example.

Q Are you saying that you look for some evidence of professional growth?

A Yes.

Q Well, Dr. Penk testified earlier in this trial -- for the court, transcript page 7189 -- you told her you were denied a promotion or you were recommending against pro motion because you wanted to see the result of her sabbatical. Do you recall saying that to Dr. Penk?

A I remember the conversation. I do not recall it being -- that is my statement as being quite in that tenor.

What I recall saying is that it might be that the work that she would be doing during her upcoming sabbatical might provide the kind of material that would be evidence of professional growth.

Q Was your recommendation against promotion hinged at all on the fact that she was going to take a sabbatical next year?

A No. Had no relationship.

(Tr. 14,205-207).

As to the promotion of Dr. Barnard, Dr. Bergman testified as follows:

Q [By Mr. Willner] Do you know Dr. Barnard in the mathematics department?

A Yes, I do.

Q Was he promoted to full professor at the same time that Dr. Penk was denied?

A I believe it was the same year.
Q All right. And has he had any publications ----

A He has had -- excuse me.

Q First I will start in refereed journals since he's been on the Western Oregon State College faculty?

A I am not aware that he has published in refereed journals. He however has had a number of publications.

Q What kinds of publications if

there are none in refereed journals.

A Largely publications intended for school teachers, teachers of math.
Q All right. And did you consider the fact when you promoted Dr. Barnard and did not promote Dr. Penk that he had no refereed publications of any sort?

A I made note of that in my recommendations to the personnel committee but I pointed out that his publications and his activities in conferences with teachers, in papers that he had read and in the publication that he had done that he was very active professionally. And since his emphasis is in the field of teaching teachers, I felt that it was reasonable to recommend his promotion on that basis.

Q But he was being promoted not to professor of education but to professor of mathematics; isn't that true?

A That's true. But at Western Oregon State College the great majority of the majors in mathematics or even minors in mathematics are going to be teachers. They're getting certification.

(Tr. 14,219-220).

The Board's testimony regarding Dr. Nelson's promotion to full professor is

as follows:

> Q [By Ms. Abernethy] Is there a Dr. Nelson in your department?
>
> A [By Dr. Brodersen] Yes.
>
> Q Do you know how long it took him to be promoted?
>
> A Yes.
>
> Q I'm going to hand you what's been marked as 4159-J. Are these the notices of appointment for Dr. Nelson?
>
> A They are.
>
> Q With references to those notices of appointment, how long had it taken for Dr. Nelson to be promoted?
>
> A The first references to his position as associate professor of mathematics is for '73-'74.
>
> Q And then when did he become full?
>
> A The first reference to his rank as professor is '82-'83.
>
> Q Is that nine years?
>
> A Yes.

(Tr. 14,413).

This is basically all of the testimony that the Board offered

regarding Dr. Nelson's promotion although the Court has his vita. It appears that Dr. Nelson's publications and scholarly research did not exceed Dr. Penk's although Dr. Nelson had been in the rank of associate professor for nine years and Dr. Penk had been in the rank of associate professor for four years when each applied for promotion.

In addition, Dr. Penk testified as follows:

> Q [By Mr. Willner] All right, now, compare yourself with Dr. Nelson in terms of teaching, research and service. Do them one at a time.
>
> A Yes, he's a very dedicated teacher. But they tell me I'm an excellent teacher.

(Tr. 7,176).

> Q [By Mr.Willner] All right, and what was Dr. Nelson's research?
>
> A He has not done any research.
>
> * * *

> Q All right, how do you compare yourself with Dr. Nelson in terms of service?
>
> A He is a very dedicated man, and he does as much as he can. He is very ill, and I do not want to say any more about it. He's -- it's a very sad situation. But he's very dedicated.

(Tr. 7,177-178).

Court's Conclusion Regarding Promotion

While Dr. Barnard did not have a record of significant scholarly publications, his numerous professional activities qualify as professional growth. In the field of teaching teachers how to teach mathematics, he was and is very active. Dr. Barnard is not an appropriate promotion comparator for Dr. Penk. His record of demonstrable professional growth exceeds hers.

WOSC administrators did not follow their stated criterion of requiring demonstrable professional growth in

promoting Dr. Nelson. Even though Dr. Nelson had been in the rank of associate professor for nine years, the record shows that he had produced no publications, scholarly research or other demonstrable evidence of scholarly activity. The Board does not claim other wise.

Dr. Penk does not take issue with Dr. Bergman's position that she had not demonstrated the necessary professional growth to merit promotion. She offers no activity which would meet the requirement. Instead, Dr. Penk claims that the requirement of demonstrable professional growth is not a real qualification for promotion but only a pretext for discrimination against women. To support this position Dr. Penk points to Dr. Nelson, a man, who was promoted

without having to meet the scholarly activities requirement.

The court finds that demonstrable professional growth is a valid qualification for promotion at WOSC. The evidence strongly supports the Board's position that promotions are ordinarily evaluated in light of publications and other evidence of professional advancement. While this qualification is not simply a ruse to hide promotion decisions based upon sex, uneven application of such a qualification between men and women, provides some evidence from which the court can infer intentional discrimination.

The professional growth qualification for promotion was applied differently to Dr. Penk, a woman, than it was to Dr. Nelson, a man. While Dr. Nelson was promoted without

demonstrating any professional growth, Dr. Penk's promotion was deferred for that specific reason. The Board offers no other reason for the decision to promote Dr. Nelson. In fact, the Board offers no explanation for his promotion. While the Board points out the fact that Dr. Nelson had been in the rank of associate professor for nine years, there is no evidence before this court that this was a factor in the decision to promote him. In addition, there is no evidence of the influence of years in prior rank in the decision to promote an individual and, more importantly, in this context, there is no evidence that the qualification of professional growth is in any way influenced by the time spent in the prior rank. The court is confident in assuming that professional growth remains a qualification for

promotion regardless of the number of years since the last promotion.

Many courts have expressed concern that sex discrimination can be inconspicuous, but with grave effect. See, e.g. Griggs v. Duke Power Company, 401 U.S. 424 (1971) and Sweeney v. Board of Trustees of Keene State College, 604 F. 2d 106 (1st Cir. 1979). In recognition of the difficulty that women face in attempting to prove discrimination in employment decisions which involve many subjective evaluations, intentional discrimination can be inferred from just the type of inconsistent treatment that Dr. Penk has proven to this court.

Dr. Penk prevails on her promotion claim.

OFFICE SPACE

In her last claim of sex discrimination, Dr. Penk contends that she was required to share office space with other faculty members because of her sex. Dr. Penk testified as follows:

> Q [By Mr. Willner] From 1973 until after this lawsuit was filed, what kind of office facilities did you have?
>
> A Well, I had an office, and that's about all I can say. If any woman was hired at the time, she was usually put in to share the office with me. I've never had a -- my own office until a few years ago.
>
> In fact, one time there were three of us in the same office with two desks, while all the men had their own private offices. And at the time there were some vacant rooms that could have been made into additional offices for us, but they weren't.
>
> Q Did those -- that office space-- how many women were sharing that space?
>
> A Most of the time two, at one time three.
>
> Q All right.

A And my objection at the time was not that I was sharing the office with somebody else. I got along fine with the people that were there. But I was advising students and it's very unpleasant to have students come to talk to you about their personal problems and have somebody else listening in or have two other people listening in. (Emphasis added.)

One of the women that shared my office that one year was a heavy smoker. And I -- I'm very allergic to it. So I complained many times to Dr. Broderson that I'd have to do something about it. And they all looked very sad, "Yeah, it's a terrible thing, yeah, we'll see what happens, what we can do," and nothing happened.

Q Did any of the male faculty have -- not have private offices?

A No. They all had private offices, yes.

Q All right.

A In fact, at the time there was a private office closed. A man was on sabbatical. And I requested that they let me move into his office. And I was told that they didn't want to disturb his desk or books as he had them. So I couldn't use his office.

Q Incidentally, how many women in the mathematics section now?

A I'm the only one.

Q And for how long have you been the only one?

A I believe since 1980-81.

Q And during the time that you have been there, how long have the other women stayed? You said there have been some other women there on short time, fixed term appointments?

A Yes, but they stayed there from 1973 to 1980-81. There was always another person, another woman teaching part-time, fixed term appointment.

Q And different ones during that period of time?

A Excuse me.

Q Were they changing?

A Once they changed.

(Tr. 7,171-173).

In response to Dr. Penk's complaint and testimony about office space, Dr. Broderson, the department chair, testified as follows:

Q [By Ms. Abernethy] . . . There's been testimony in this case with regards to the office space afforded Dr. Penk. Do you recall during the years Dr. Penk was employed her discussing with you her office space situation?

A Yes, I do.
Q What do you recall about those discussions?

A I recall comments about heating and cooling situations in her office which is in Arnold Arms, and the building, until it was recently insulated, was very cold during the winter, very hot during the summer.

I recall conversations with her about difficulties of her office mate, Claudia Aldrich, smoking and that bothering Dr. Penk.

Q With regard to the heating and cooling, what's the name of the building again?

A Arnold Arms.

Q Are there other offices in Arnold Arms besides the one that was assigned to Dr. Penk?

A Yes.

Q Are there other offices of people in your department in that building?

A Yes.

Q Is the whole department in that building?

A The mathematics section is primarily in that building.

Q And what, if you know, is the heating and cooling situation of other offices for people in the mathematics section who had ----

A Also uncomfortable.

Q Was the heating and cooling problem throughout the entire building?

A It's not uniform, yes.

Q With regard to the problem of Ms.Aldrich's smoking, when, if you recall, did Dr. Penk bring that problem to your attention?

A I do not recall when.

Q What if any efforts did you take to rectify that problem?

A I do not remember taking any concrete action to rectify the problem.

Q Why not?

A I had hoped that together as office mates they would be able to resolve the situation.

Q When did Dr. Penk receive an office -- her own office?

A As a factual entity, when Sara McCabe was not hired part-time, Anna had and has that office. During the intervals that Sara McCabe has been part-time faculty, she and Anna have continued to share an office.

Q I believe there was testimony by Dr. Penk that when you --she received a tenure and tenure track position effective '79-'80, that she had her own office. Is that different from your recollection?

A In this regard: I believe since then on a couple of occasions Sara McCabe has been employed and has used part of that office that Anna occupies.

Q Well, can you describe for the court generally what the office situation is like for the persons in your department?

A Generally speaking, we'd have individual offices in some cases in the natural sciences building, not Arnold Arms. People share an adjoining resource or research area and have somewhat smaller adjoining office spaces.

Q Was there an office available for you to give to Dr. Penk in the earlier years when she was a part-time person?

A Yes, I believe that there was.

Q Well, why didn't you give it to her?

A I did not understand there to be a difficulty.

Q What was your understanding of the difficulty?

A One due to the physical problems of heating and cooling.

Q And was there a time subsequent to that when you became aware that there was a difficulty about the sharing or did you ever become aware of that difficulty?

A I did not become aware of it.

(Tr. 14,430-433).

In September, 1979, Dr. Penk received a full-time, tenure track position, and, within a reasonable time thereafter, her own office space. Although she was first hired at WOSC in 1973, prior to September, 1979, she was a fixed-term and frequently a part-time employee with no guarantees of continuing employment from one term to the next. Dr. Penk was not entitled to the same

office space as tenure track or tenured faculty until she became a tenure track and tenured faculty member in 1979. Then she received her own office space.

More importantly, there was office space available to Dr. Penk had she presented her grievance about space directly to Dr. Broderson. He believed her complaint to be about inadequate heating and cooling -- over which he had no control and from which both men and women suffered -- and about an office mate who smoked -- a problem which Dr. Broderson wanted the office mates to work out together. Dr. Broderson's position was reasonable.

As to Dr. Penk's testimony that she needed her own office space for student advising and consulting, the following testimony is relevant:

> Q [By Ms. Abernethy] And up to the point when you received tenure, 1979, isn't it true that you were held -- told directly by the dean that for those quarters when you actually taught full time, I believe there were some quarters when someone went on a sabbatical or-- and you were put on 1.0 FTE, isn't it true in regards to those periods that you were teaching full time, you were directly told that your responsibilities were to teach and you weren't required to do student advising and serve on committees and such?
>
> A It was.

(Tr. 7,206).

Dr. Penk cannot prevail on her claim of sex discrimination regarding office space.

Dr. Penk Footnotes

1. Western Oregon State College was called Oregon College of Education until the early 1980's. The court will use the acronym "WOSC" for this institution for all times discussed.

2. These are figures submitted in plaintiff's exhibit 209(c). The court is unable to determine whether the 1978 and 1979 salaries are in fact the same. Plaintiff's exhibit 209A lists Dr. Penk's salary for the 1978-79 academic year at $17,153, but provides no salary figures for her comparators.

3. Dr. Penk submitted no proposed findings as to Dr. Green's starting salary. The court accepts the Board's argument based on Dr. Broderson's testimony that Dr. Green is not a reasonable comparator for Dr. Penk as to starting salaries.

DR. MARY ANN PETRY

Dr. Mary Ann Petry, a former professor of art and art education at Western Oregon State College (WOSC), who was terminated in a "reduction in force" procedure in 1983, claims that she was discriminated against because of her sex in that (1) she was hired without tenure while male professors in the same department who were less qualified or equally qualified had tenure; (2) she was treated less respectfully than males, was not included in informal activities as were males, and was not allowed to participate in certain classes as were males; and (3) she was denied tenure in 1982 although she was fully qualified to become a tenured faculty member. Dr. Petry intervened in this action as a named plaintiff without filing a charge

with the Equal Employment Opportunity Commission.

In 1977 Dr. Petry was hired without tenure as a full professor of art and art education at WOSC (then known as Oregon College of Education). Dr. Petry has a B.A. degree in English from St.Johns University, Jamaica, New York (1953); an M.S. degree in elementary education from Fordham University, The Bronx, New York (1958); an M.F.A. degree from Pratt Institute, Brooklyn, New York (1966); and a Ph.D. degree in art education from New York University, New York (1971). She taught elementary and high school art from 1950 to 1961 and was chair of the Art and Art Education Department at Molly College from 1961 to 1973. From 1973 to 1974 Dr. Petry was an assistant professor at the University of Delaware, and from 1974 to 1977 she was an

associate professor at the State University of New York at New Paltz, New York.

Dr. Petry specializes in printmaking. She has exhibited her work in the Brooklyn Museum, the National Historic Society, and numerous other galleries. She is Pacific Regional Director of Higher Education for the National Art Education Association and a board member of the Alliance for Arts Education.

In 1978 Dr. Petry joined the Department of Creative Arts at WOSC in the art area. At that time Dr. Ron Wynn was chair of the department and James Mattingly was the art area coordinator. At the time of her hire then-President Leonard Rice wrote to Dr. Petry regarding her initial conditions of employment stating that she would be

evaluated for tenure after five or six years of continuous employment. Dr. Petry was considered for and denied tenure in 1982. In 1983 Dr. Petry was considered for and granted tenure.

TENURE AT THE TIME OF HIRING

Dr. Petry claims she was denied tenure at the time of hire because she was a woman. However, Dr. Petry herself testified that she knew of no one at WOSC who was hired as a full professor with tenure. Dr. Wynn, the department chair; Dr. James Beaird, the Provost; and Dr. Gerald Leinwald, the President; all testified that they knew of no one hired as a full professor with tenure at WOSC. Furthermore, at the time she was hired Dr. Petry was notified that she would be considered for tenure after five or six years of continuous employment. There is no evidence before the court to suggest

that this was improper or motivated in any way by her sex. Dr. Petry is not entitled to prevail on her claim that she was hired as a full professor without tenure while male professors in the same department who were less qualified or equally qualified had tenure.

UNPROFESSIONAL TREATMENT

Dr. Petry also contends that she was discriminated against on the basis of sex in that she was treated unprofessionally and with less respect than her male colleagues. This contention centers around the actions of the art area coordinator, Mr. Mattingly. The undisputed evidence is that after Dr. Petry's election as chair of the curriculum committee, Mr. Mattingly stated, "It's about time we have a broad to head this committee."

Dr. Petry also claims that she was generally excluded from informal activities of the male faculty members. She contends that despite the fact that Mr. Mattingly frequently shared courses with male faculty members, when Dr. Petry asked him if she could teach a printmaking course one summer session, he replied, "Over my dead body." Mr. Mattingly wrote that Dr. Petry was "not allowed to teach in [his] printmaking studio."

The Board concedes that Mr. Mattingly made sexist remarks and acted unprofessionally toward Dr. Petry. Provost Beaird, Dean Hermas Bergman, and Dr. Wynn each acknowledged in his testimony that Mr. Mattingly had acted unprofessionally toward Dr. Petry. The Board contends, however, that when the WOSC administration became aware of Mr.

Mattingly's unprofessional treatment of Dr. Petry it took action to correct Mr. Mattingly's behavior.

Dean Bergman testified that he had two meetings with Mr. Mattingly in the summer or fall of 1981. Dr. Wynn and Dr. Beaird were present at one meeting, and Dr. Bergman met with Mr. Mattingly alone once. Dr. Bergman testified that he spelled out what he thought were errors Mr. Mattingly had made in his attempts to evaluate Dr. Petry and made clear to Mr. Mattingly what he expected of him in the future. Dr. Bergman testified that he specifically talked to Mr. Mattingly about his sexist remarks and instructed him to be more professional in his approach to Dr. Petry.

Dr. Wynn testified that he spoke privately to Mr. Mattingly about his

unprofessional behavior and that since that conversation he has had no indication that Mr. Mattingly has acted unprofessionally toward Dr. Petry.

Dr. Beaird testified that he discussed the problem that had occurred between Mr. Mattingly and Dr. Petry with Dr. Bergman and subsequently with Mr. Mattingly. He testified that he told Mr. Mattingly to act more professional in his approach to evaluating Dr. Petry and that he believed that Mr. Mattingly had changed his behavior as a result of these conversations.

A discriminatory work environment may amount to discrimination with respect to the terms, conditions, or privileges of employment. In Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), the court was faced with a situation where the employer's supervisory personnel had

created a substantially discriminatory work environment but the employee had not lost any tangible job benefit as a result of the discrimination. The court held that the employee could bring an action under Title VII and explained:

> The relevance of these "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against a company's minority clients may reflect no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional

> assault on an individual's innermost privacy, not be illegal?

641 F. 2d at 945. See also Gray v. Greyhound Lines, East, 178 U.S. App. D.C. 91, 545 F. 2d 169, 176 (D.C. Cir. 1976) (pattern of racial slurs violates Title VII rights to non-discriminatory environment); United States v. City of Buffalo, 457 F.Supp. 612, 631-635 (W.D. N.Y. 1978) (black employees entitled to work environment free of racial abuse and insult); Compston v. Borden, Inc., 424 F.Supp. 157 (S.D. Ohio 1976) (demeaning religious slurs by supervisor violate Title VII); Steadman v. Hundley, 421 F.Supp. 53, 57 (N.D. Ill. 1976) (racial slurs may lead to Title VII violation).

While the facts in this case support Dr. Petry's claim that she was subjected to a discriminatory environment, this

case differs in a very important way from Jackson and the cases which follow it. In Jackson, the court found that the employer could be held liable for the discriminatory acts of its supervisory personnel because it had full notice of harassment committed by the agency supervisor and did "virtually nothing to stop or even investigate the practice."

Here WOSC administrators took action to correct Mr. Mattingly's behavior. There is no evidence that Mr. Mattingly continued to act "unprofessionally" toward Dr. Petry after Dr. Bergman, Dr. Wynn, and Dr. Beaird told him that his behavior needed to be modified. While the court finds that Dr. Petry was treated unprofessionally by Mr. Mattingly, the court further finds that the Board took reasonable and successful steps to correct the discriminatory

behavior and therefore cannot be held liable for Mr. Mattingly's actions under these circumstances.

DENIAL OF TENURE IN 1982

Dr. Petry contends that she was discriminated against on the basis of her sex in that she was not granted tenure in 1982, although she was fully qualified to become a tenured faculty member. Dr. Petry claims that she was as equally qualified to be granted tenure in 1982 as she was in 1983 when she was in fact granted tenure. She also claims she was granted tenure in 1983 because she joined as a plaintiff in this suit.

In 1982, Provost Beaird recommended to President Leinwald that Dr. Petry's application for tenure be deferred for a year. Dr. Beaird testified that the reason for that recommendation was that serious questions had been raised in the

course of deliberations in the Senate personnel review committee (the college level review committee) regarding Dr. Petry's shallow treatment of a particular period of art history. Dr. Beaird claims these serious questions were sufficient to convince him that the college should take another year to review Dr. Petry's teaching performance. Dr. Beaird testified that the questions were raised by one of Dr. Petry's colleagues who was a member of the Senate personnel review committee and a member of the teaching team that taught an inter-disciplinary course with Dr. Petry. Dr. Beaird also testified that Mr. Mattingly's problems with and evaluation of Dr. Petry had no influence upon the tenure decision. Dr. Beaird explained that by the time of the 1983 tenure review he was satisfied and the

Senate personnel review committee was satisfied that there was no foundation to the previous year's charge and that Dr. Petry was qualified to receive tenure. Dr. Beaird testified that he did not know whether Dr. Petry was a member of the class or a plaintiff in this case when the 1983 decision was made.

President Leinwald testified that he tried to make it more difficult for faculty to obtain tenure after his arrival in 1977. He felt there was an "unhealthy balance" in some departments because too many of the faculty were tenured. Dr. Leinwald wanted tenure decisions to be subject to the most severe and most critical kind of peer review and not be a mere "back scratching exercise." Dr. Leinwald wrote and circulated to the faculty in 1980 a

document entitled "The Award of Tenure" which reflects this view.

In 1982 Dr. Petry's tenure application file contained both negative and positive evaluations from students and from other faculty members. Several faculty members wrote negative evaluations and several students signed an unsolicited negative student evaluation which was included in her file. The personnel review committee for the creative arts area had recognized that there were both negative and positive evaluations of Dr. Petry and had reservedly recommended to the Senate personnel review committee that Dr. Petry be granted tenure.

Several of the defendant's witnesses testified that Mr. Mattingly's evaluations of Dr. Petry did not influence the decision not to grant her

tenure in 1982. Dr. Bergman testified that he had recommended Dr. Petry for tenure in 1982 because Mr. Mattingly had treated her unprofessionally, making it difficult to judge her qualifications. Dr. Bergman testified that despite the fact that he did not consider Dr. Petry a particularly strong candidate for tenure in 1982 he wanted to "bend over backwards" because of Mr. Mattingly's treatment. In 1983, Dr. Bergman recommended that Dr. Petry be denied tenure based upon problems she had with supervising teachers and because of student complaints.

CONCLUSIONS OF THE COURT

Dr. Petry's qualifications for tenure did not change significantly from 1982 when she was denied tenure to 1983 when she was granted tenure. The decision to defer Dr. Petry's request

for tenure in 1982 was made at the Senate personnel review committee level and was based upon the objection of one member of the committee who was a colleague of Dr. Petry in the art area. Dr. Beaird made no further investigation of that objection before he submitted his recommendation to the President that tenure be denied. By 1983 Dr. Beaird had determined that the objection made in 1982 was no reason to deny tenure to Dr. Petry. Dr. Beaird did not explain what further investigation he had done or what factors influenced him to change his mind. Dr. Beaird rarely recommended to the President that tenure be denied and in several instances further investigation was promptly undertaken before denying tenure.

The court finds that no reasonable explanation has been given by the

defendant for denying Dr. Petry tenure in 1982 in light of the fact that she was granted tenure in 1983 with exactly the same concerns and deficiencies that had been pointed out in 1982. The court concludes that the unprofessional evaluations by Mr. Mattingly and the discriminatory work environment created by Mr. Mattingly's actions influenced the decision to defer the grant of tenure in 1982.

Dr. Petry is entitled to prevail on this portion of her individual claim.

SOUTHERN OREGON STATE COLLEGE

ASHLAND, OREGON

Rosemary Dalton

Sherry Ann McLoud Mihel

ROSEMARY DALTON

Rosemary Dalton,[1] a resident of Boston, Massachusetts, contends that she was discriminated against because of her sex while she was employed as the director of the Women in Transition program at Southern Oregon State College (SOSC) in that (1) she was assigned the title of research assistant rather than the rank of instructor, from 1977 to 1979 while equally qualified men who served as directors of various programs were assigned academic ranks, and (2) from 1977 to 1980 she was paid disproportionately less than Dr. William Wanger, the Director of Counseling, considering his qualifications and responsibilities. Ms. Dalton did not file a complaint with the Equal Employment Opportunity Commission.

Ms. Dalton received a B.A. degree in

political science in 1975 and an M.A. degree in general studies with an emphasis in psychology in 1976, both from SOSC. Prior to beginning her studies at SOSC, Ms. Dalton had worked in office management, community relations, communications, group encounters, counseling, fund-raising, and grant-writing. Much of her work was centered around interracial problems in Detroit, Michigan.

RANK CLAIM

Ms. Dalton first became employed at SOSC on a part-time basis in the admissions office during the 1975-76 academic year while she was a graduate student. She received a work-study grant and coordinated the Lifelong Learning Program. During this 1975-76 academic year Ms. Dalton, Dean of Students Mary Christlieb, Admissions

Director Ellen Blazac, and Director of the Counseling Center Dr. Bill Wangen, discussed ways in which to hire Ms. Dalton full-time as a counselor for women students who were returning to college. Dean Christlieb applied for and obtained federal Comprehensive Education and Training Act (CETA) funds which were matched by SOSC in order to fund a position for Ms. Dalton during the 1976-77 academic year.

With the CETA funds and the matching funds, Ms. Dalton was hired as Learning Resources Coordinator and Coordinator of the Women's Program, later known as Women in Transition. Although her title changed between 1976-77 and 1977-78, and although the emphasis in her responsibilities changed slightly, Ms. Dalton's major responsibilities from September, 1976, through June, 1980,

when she resigned, included the following:

1. Personal, career, and academic counseling for re-entering women students and students contemplating returning to college;

2. Teaching one study skills class per term;

3. Counseling and/or training faculty on the needs of returning women students;

4. Conducting workshops;

5. Engaging in community outreach for recruiting women students.

6. Directing the Women's Program -- later called Women in Transition.

Under a separate employment contract, she coordinated 2 - Ms. Dalton the Women's Summer Forum in 1978 and 1979. From 1978 to 1981, Ms. Dalton was a member of the Governor's Commission

on the Status of Women for the State of Oregon, and for one year she was the elected chairperson of that committee.

During the 1976-77 academic year, Ms. Dalton's title was "Psychological Assistant," a title which reflects CETA requirements. The record is a bit confusing, but in the 1977-78 and 1978-79 academic years, her title was either Research Assistant or Graduate Assistant. In 1979-80 she became an instructor, an academic rank.

Ms. Dalton claims that she was discriminated against because she did not receive the rank of instructor when she became a full-time employee in the fall of 1976. Both Dr. Wangen and Dean Christlieb had petitioned then-President James Sours for the rank of instructor for Ms. Dalton in the fall of 1977. President Sours denied that request. Ms.

Dalton claims that he denied that request because she is a woman. Dean Christlieb testified as follows:

> Q [By Mr. Lidz] Do you know why the president did not award her instructor rank in the fall of '77 and '78?
>
> A We were going through at that time one of the most serious of our budget cuts. There had been several readjustments in the administration. Three, at that time, deans' positions were eliminated. That was not a very good time to consider creating a new position in the administration rank even at instructor level when you are firing faculty and other administrators.

(Tr. 17,387).

Dr. Sours testified as follows:

> Q [By Mr. Lidz] . . . What was happening to the number of faculty and administrators during this period of time in 1976-77 and '77-78?
>
> A I don't recall specifically any particular year, but I know that from 1973 forward through the rest of my administration we surrendered a number of FTE

> positions, both faculty and civil service, to a total I think of about 31, as I recall. And we were making reductions. We were not filling certain vacancies and finding other ways to retrench our spending. And several programs floundered for really lack of adequate funding.
>
> We had to abandon, for example, the Southern Oregon Regional Center, Regional Studies Center. We did not have proper funding for even the academic programs, the purchase of equipment for laboratories and things of that sort.

(Tr. 17,599-600).

In support of her claim that she was denied academic rank because of her sex, Ms.Dalton compares her position to the positions of five men in the student services area who had academic rank and directed programs: Director of Housing; Director of Financial Aids; Director of Career Planning and Placement; Director of the Veterans Program; and Director of

Counseling. Each of these men was hired after searches to direct established programs. Funds from the institution were budgeted for the salaries of the directors of these programs. Ms. Dalton was hired on temporary federal funding, without a search, to design and implement a program which grew out of her work for her masters degree. Simply because each of the male program directors has the title "Director" does not mean that each has responsibilities comparable to those of Ms. Dalton. The court does not know when each of these programs was started, or the circumstances surrounding its creation or each of the directors' responsibilities. There is also insufficient evidence before the court to make a full comparison between Ms. Dalton and her named comparators in terms of prior

experience and academic credentials. Furthermore, others with the title of "Director" at SOSC did not hold academic rank. For example, the man who counseled veterans returning to college did not have academic rank but was called a director. Ms. Dalton bears the burden of proving her claim of discrimination in rank assignment.

Dr. Sours' testimony that he was not certain that SOSC could fund Ms. Dalton's position after the CETA grant expired and that he did not want to commit the college to funding for a new regular faculty position at a time when other faculty were being terminated is credible. This reason for declining to place Ms. Dalton into an academic rank is a legitimate non-discriminatory reason and is not a pretext for sex

discrimination.

SALARY CLAIM

Ms. Dalton next contends that while she should not be paid as much as Dr. Wangen, the Director of Counseling, the discrepancy between their salaries is too great and that the reason is sex discrimination. Dr. Wangen received a bachelors degree in education and speech therapy in 1963; a masters degree in guidance and counseling in 1967; and an Ed.D. degree from Oregon State University in 1970. He was hired at SOSC in 1970 at a salary of $13,608. He serves on a 12 month contract.

Ms. Dalton came to SOSC in 1974 as an undergraduate student. She received a B.A. degree in political science in 1975 and a masters degree in general studies in 1976. Her salary is based on a 9 month contract. As Director of the

Counseling Center, Dr. Wangen was responsible for all of the counseling staff as well as its budget. He supervised two other part-time counselors who had faculty rank. Ms. Dalton supervised no one with faculty rank or professional training. Dr. Wangen taught counseling courses at the upper division and graduate level, as well as general psychology courses. Ms. Dalton had no professional credentials as a counselor and no advanced degree in counseling. She was not able to teach the kind of courses that Dr. Wangen taught. In summary, Dr. Wangen had substantially more education, more experience, and more responsibilities than Ms. Dalton. He is certainly entitled to a substantially larger salary than she.

In the fall of 1977, Ms. Dalton's salary was $8,600 for a 9 month appointment. By April 1, 1978, her salary was $9,234. She received an out-of-the-ordinary raise of $3,000 in September, 1978, which brought her salary to $12,234. As of December 1, 1978, she received $12,863. For the 1979-80 academic year, the year she received academic rank as an instructor, her salary was $13,518. This sum was above average when compared to the salaries of other instructors.

Dean Christlieb testified as follows:

> In light of what academe pays for experience and degree, that [salary of Ms. Dalton] would be appropriate. That's the way salaries are set. Number of years of experience, number of years in rank on that particular campus, degree earned, number of years the degree has been held. That's how you get your pay.

(Tr. 17,421).

Dean Christlieb also testified that she felt the salary difference between Ms. Dalton and Dr. Wanger was "commensurate." Dean Christlieb was a credible witness.

The court concludes that Ms. Dalton cannot prevail on her individual rank and salary claims.

Rosemary Dalton Footnotes

1. Ms. Dalton's testimony was received by deposition because of her health.

SHERRY ANN MCLOUD MIHEL

Sherry Ann McLoud Mihel, who resigned her position as assistant professor of library science at Southern Oregon State College (SOSC) in early 1984, claims that she was discriminated against because of her sex in that she was hired at the rank of instructor in September, 1978, while George Mihel, an equally qualified man in substantially the same position, was hired at the rank of assistant professor in September, 1978. She also claims that on the basis of her sex she received a lower salary than George Mihel at the time they were hired and thereafter. Ms. Mihel intervened in this action as a named plaintiff without filing a charge of sex discrimination with the Equal Employment Opportunity Commission.

Ms. Mihel received a B.A. degree with a double major in history and French from Western Washington State College (now Western Washington University) in 1969; and a masters degree in library science from the University of Oregon in March, 1971. She was then employed as children's librarian at the Bellingham Public Library (three months) and at the Whatcom County Public Library (5 years). In September, 1976, she began work on a doctoral degree in educational media at the University of Washington. By June, 1978, she had completed all of her course work for her doctoral degree and had taken and passed all of the required examinations. She was then in a status known in the academic community as ABD (all but dissertation). During the time she was studying for her doctorate, she was a teaching assistant

at the University of Washington.

In the early spring of 1978, SOSC issued a "Vacancy Notice," an announcement of a position opening for an instructor of library science, a fixed-term, nine months position with a salary range from $12,000 to $13,000, depending upon experience. The educational preparation required was MLS (master of library science) and M.Ed. (master of education) "preferred." A copy of that vacancy notice is attached to and follows this page. Ms. Mihel applied for this position.

In a letter dated June 13, 1978, in which he offers the position to Ms. Mihel, Dr. James K. Sours, the president of SOSC, advised her as follows:

> "You will be reviewed for promotion to Assistant Professor upon your completion of the doctorate or during your

fourth year of employment at Southern Oregon State College.

A copy of that letter is attached to and follows the copy of the vacancy notice. Before accepting the offer of employment, Ms. Mihel inquired about the salary level. She was told that no funds were available to hire anyone for this position above the rank of instructor despite the fact that with her ABD status she may have been scholastically overqualified for the position. Ms. Mihel then wrote a letter to Dr. Sours on June 21, 1978. She stated as follows:

> "I am pleased to accept the position of instructor in library science which you have offered me in your letter of June 13, 1978. I have carefully read your letter and attachment 1. I have no questions concerning the information supplied and find the terms and responsibilities presented therein agreeable. I have enclosed all the forms that constitute attachment 2.

BEST AVAILABLE COPY

Table 1

VACANCY NOTICE

SOUTHERN OREGON STATE COLLEGE
Ashland, Oregon 97520

An Equal Opportunity Employer

TITLE OF VACANCY Instructor of Library Science (Rank or professional title) Library (Department or Division)

TYPE OF APPOINTMENT (See 6 and 7 below) fixed term--nine months

EXPERIENCE REQUIRED Experience with Children's Literature, teaching or library experience of at least two years. Also minimum of two years experience in school media center.

EDUCATIONAL PREPARATION REQUIRED MLS and M.Ed. preferred

DESCRIPTION OF POSITION Responsible for children's literature instruction and library processes at the elementary and secondary school level. Also included are book collection coordination for education, children's literature, and library science.

DETAILS ABOUT ABILITIES REQUIRED Includes considerable knowledge of children's literature, the classic titles, abilities to critically analyze the literature and some ability to teach storytelling. Classroom experience in this subject area would be desirable.

SALARY RANGE FOR POSITION $12,000-$13,000, depending upon experience

CLOSING DATE FOR FILING OF APPLICATIONS FOR THIS VACANCY IS April 15, 1978

COLLEGE REPRESENTATIVE TO BE CONTACTED: Richard E. Moore, Library Director
Southern Oregon State College
Ashland, Oregon 97520 (503-482-6445)

All qualified applicants will be considered regardless of age, sex, race, color or minority groups, national origin, religion or handicap

FACTS ABOUT THE COLLEGE AND NATURE OF THE APPOINTMENT TO FILL THE VACANCY

1. Annual operating budget -- 1977-78 $9,300,000 (estimated)
2. Student-teacher ratio, approximately 18 to 1
3. The salary range for the instructional faculty of Southern Oregon State College for 1977-78 is $10,000 to $25,128 for instructors through professors on 9-month appointments
4. Organization -- one of eight campuses of the Oregon State System of Higher Education
5. Instructional load -- average of 12 credits per term plus committee work and student advising
6. Annual contract period -- 9 months (September 16 - June 15);12 months (July 1 - June 30)
7. All appointments are to be made on a fixed term basis which may be renewed, or may at a later date to be changed to a tenured track appointment.

BEST AVA

Table 2

SOUTHERN OREGON STATE COLLEGE

Office of the President / 482-6111

June 13, 1978

Sherry Ann McLeod
7940 - 10th, S. W.
Seattle, Washington 98106

Dear Ms. McLeod:

Upon the recommendation of Mr. Richard Moore, I am pleased to be able to offer you a position on the faculty of Southern Oregon State College. The position is that of Instructor in Library Science, at a salary of $13,000 for the nine-month academic year 1978-79. This is a one-year fixed term renewable appointment on the non-tenure track to a permanent position assigned to the Library Science Department. It is anticipated that the position will be renewed unless you are given notice to the contrary during the spring of 1979. You will be reviewed for promotion to Assistant Professor upon your completion of the doctorate or during your fourth year of employment at Southern Oregon State College. (COURT NOTE: The above underscoring was not on the letter received by Ms. Mihel.)

I hope very much that you will be able to accept this offer. Ashland offers many fine physical and cultural amenities and is, indeed, a fine place in which to live. We are very proud, at Southern Oregon State College, of our faculty and students, and of our efforts to excel in our teaching mission. We believe you can make a fine contribution to our programs. Your written acceptance of this offer, addressed to me, will constitute the necessary contract for both of us. I will appreciate receiving such assurance no later than 20 days from the date of this letter and our contract.

Enclosed are some supplementary items for your information.

In Attachment Number 1, we have identified the categories of performance for which members of the faculty are specifically responsible. Please let me summarize these briefly for you herein:

1. Scheduled and unscheduled teaching.
2. Academic program advising.
3. Posting and maintaining regular and appropriate office hours.
4. Specific and general scholarly projects.
5. Professionally related public service.

LABLE COPY

Table 3

6. Departmental, Divisional, School and Institutional Administrative and committee activities.
7. Student support service activities.
8. Course and curriculum planning.
9. Research and development.
10. Professional selfimprovement planning.

You will find each of the foregoing further detailed in Attachment 1.

The Administrative Rules also require me to inform you that you are expected to be formally evaluated, at least once in each course for one quarter, and also to be evaluated by your peers. All applications for tenure and promotion must be accompanied by tangible evidence thereof. Remedial programs, now in the developing stages, are available for those who demonstrate a need for instructional improvement.

Enclosed as Attachment Number 2 are certain personnel forms which, if you accept our offer, you should complete and return with your letter of acceptance, addressed to me.

I apologize for the length and formidability of this letter. It is our hope that we have not diminished your interest in joining the staff of a very fine and developing institution.

I look forward to your early, and favorable, response.

Cordially,

James K. Sours

James K. Sours
President

bs

Attachments

cc: Mr. Lewis
Mr. Seely
Ms. Westgaard
Dr. Ettlich

Mr. Mihel accepted the position and became employed at SOSC on September 16, 1978 at an annual salary of $13,000, the highest salary listed in the vacancy notice.

Shortly after becoming employed -- during fall term of 1978 -- she applied for a promotion in rank from instructor to assistant professor, despite the fact she had not completed the Ph.D. degree or served four years[1]. She was promoted from instructor to assistant professor effective the 1979-80 academic year and received an increase in salary. She was also appointed chair of the Department of Library Science effective the 1979-80 academic year. She was an excellent employee. There is no issue in her case about work skills or production. She received a 5% raise to accompany her promotion in 1979 and an additional

equity raise in 1980, as well as annual percentage of salary increases. Her claim relates only to her initial starting salary and rank.

Ms. Mihel uses George Mihel as a comparator to support her pay and rank claims.[2] Ms. Mihel testified that George Mihel and she were approximately the same age; that he received a B.S. degree in Education in 1970 from, "A university in Illinois. I forgot which one"; that he received a masters degree in Education in 1972; and that he was also in the status known as ABD (all but dissertation) when he was hired. Prior to coming to SOSC, George Mihel had taught for five years in junior high and one year as a teaching assistant at the university level. The position for which George Mihel applied was advertised as an assistant professor position with a

salary range between $14,000 and $16,000.

Dr. Ernest Ettlich, Dean of Academic Affairs, testified as follows:

> Q [By Mr. Lidz] Why was the position advertised at the assistant professor level?
>
> A In education you're dealing with a license year program. It's a professional program, and as I indicated in my affidavit, that professional experience is a requirement for faculty who are teaching in that area, and you'll see that reflected under the requirement of three to five years in a public school or support service area. So that the assistant prof rank was assigned in recognition that the doctorate is the normal entry degree for a person in education and that person would have to have professional experience. In some cases, we would appoint the individual with the ABD, but in no case without the professional experience.
>
> Q And what kind of courses would one teach at this position?
>
> A He'd be teaching in the professional education program, so it would be all upper

division and graduate.

. . .

Q Now, in terms of the teaching responsibilities, were the two positions [Sherry Mihels' and George Mihel's positions] involved teaching at a similar level or at different levels?

A Well, the -- the children's literature courses would be a part of the basic certification program in elementary. So it would be at the junior or senior level. The library science course that Professor Sherry Mihel would have taught would have been probably at the 400 level, whereas, Professor Mihel would be teaching likely one 500 level course every term.

Mr. WILLNER: You are talking about him, now?
THE WITNESS: Professor George Mihel.

Mr. WILLNER: Yes.
THE WITNESS: Would teach in instructional media and would have one 500-level course each term, likely, and all 300 to 400 level courses other than that.

Sherry Mihel, of course, would also teach that freshman

> level introduction to the library for new students on an irregular basis just as she had the time.

(Tr. 17,460-462).

While the educational backgrounds of the Mihels may be comparable, and while they may both teach upper division courses, and while George Mihel may have been slightly underqualified for the position for which he applied and to which he was hired, and while Sherry Mihel may have been overqualified for the position for which she applied, and to which she was hired, their disciplines are different. Mr. Mihel is a faculty member in a professional school, the School of Education. Ms. Mihel is a faculty member who is a librarian. Ms. Mihel's claim is basically a comparable worth claim. In her testimony (by

deposition), Ms. Mihel testified as follows:

> Q [By Mr. Willner] Why do you believe that he [George Mihel] was paid more than you were?
>
> A Because he's a man and I'm a woman.
>
> Q And why do you believe that this was the reason that he was paid more than you were?
>
> A The library field is predominantly women. It's -- in statistical abstracts -- it's 81 percent women in the library field. In education, and particularly education in an institute of higher education, it's predominantly men, about 67 percent men. And I believe that the administration was aware that it would be most likely a woman would be hired within the library field, and so they offer a lower salary. There are also not many openings and a lot of people looking for positions in the library field, and those people are predominantly women, and they are willing to take a job if one comes available and at a lower salary because there are so few positions.

(Pl. Ex. 2684, Deposition of Ms. Mihel, June 7, 1983, pp. 20-21).

The vacancy notices for the positions for which Sherry Mihel applied and George Mihel applied were sex-neutral vacancy notices. Either sex could have applied for either job. A contention has been made throughout this trial that the pay of nurses, dental hygienists, and librarians is low in comparison with the salaries of predominantly male-dominated positions such as doctors, dentists, and football coaches. The court has already ruled that those issues are foreclosed in this lawsuit. See Opinion and Orders of August 10, 1984 and September 13, 1984.

Sherry Mihel cannot prevail on her individual claim.

Ms. Mihel Footnotes

1. It is a common practice for institutions to hire faculty in the status of ABD (all but dissertation) at the rank of instructor and then to promote them as soon as the doctoral degree is received.

2. George Mihel became Ms. Mihel's husband in 1980. They did not know each other when they began their employment at SOSC. Ms. Mihel also contends that Randy Hitz and Michael Davey are appropriate comparators. Ms. Mihel testified as follows (by deposition):

> Q [By Mr. Willner] In addition to the comparison with your husband, George Mihel, are there other male faculty members that you compare yourself with in terms of salary or rank?
>
> A That were hired at the same time. There's Randy Hitz in the education department.
>
> Q Let's do one at a time, then.
>
> A All right.
>
> Q What was Randy Hitz's education and background before he was hired?
>
> . . .
>
> A He completed a BS in '71, I

believe. I'm not positive of the dates. And then a masters in I think '75. And those were in education. His major was early childhood education. And he then worked on a doctorate, also.

And when he came to the college, he came with his doctorate completed except for dissertation.

Q The same situation as yours?

A The same situation. And he was hired as assistant professor, and his salary was $14,800.

Q What experience did he have before he came there, do you know?

A I'm not sure. I know he had taught before he came.

Q Do you know his approximate age?

A I think he's a year or two younger than me. He's about the same age, approximately.

. . .

Q Are there other members of the faculty which you compare yourself with in terms of salary or rank?

A There's one in, I believe it's the Physical Education Department, Dave -- that's his last name. Davey.

Q Davey. Do you know his first name?

A I think it's Michael.

Q Do you know what his education was before he came?

A I know he received his bachelors a few years after I did, and his masters, also, after I did. I don't know if he's doing work on a doctorate.

Q Do you know what experience he had?

A No.

Q Do you know his approximate age?

A Approximately the same age.

Q The same age as you?

A As me.

Q Was he hired the same time as you?

A Yes, he was, fall of '78.

Q What was his rank?

A Assistant professor.

Q And what department did you say?

A P.E. And he taught -- he coached, but he also taught education PE courses, and I believe they had education majors.

(Pl. Ex. 2684, Deposition of Ms.Mihel, June 7, 1983, pp. 23-26).

This is the only evidence presented by Ms. Mihel regarding these two comparators. It is insufficient to allow a comparison between Ms. Mihel and these two men. Furthermore, she presented no documentary evidence to support this testimony. The court declines to discuss further these two men as comparators for Ms. Mihel.

OREGON INSTITUTE OF TECHNOLOGY

KLAMATH FALLS, OREGON

Lorraine B. Furby

Margaret Huntley

LORRAINE B. FURBY

Lorraine B. Furby, an assistant professor in the Department of Nursing in the Division of Health Technologies at the Oregon Institute of Technology (OIT), claims that she was discriminated against because of her sex in that (1) she was paid less than her male predecessor for performing substantially the same job; (2) she is paid less than equally qualified men who were performing substantially the same job as she performs; and (3) she was denied promotion to the rank of associate professor while men with substantially equal qualifications, experiences, and positions were promoted to the rank of associate professor. Ms. Furby intervened in this action as a named plaintiff without filing a claim of sex

discrimination with the Equal Employment Opportunity Commission.

Ms. Furby came to OIT in 1961 on a one-year contract as an instructor. She was hired to start a two-year dental assisting program that would meet the standards for accreditation set by the Council of American Dental Assistants Association. At that time Ms. Furby was a Certified Dental Assistant and a Dental X-ray Technician, but she had no Bachelors degree. Prior to her appointment at OIT, Ms. Furby had worked in a private dental office as a dental assistant and dental laboratory technician (five years); as an X-ray technician at the University of Oregon Dental School (two years); and as an instructor at the University of Oregon Dental School (one year).

Ms. Furby's contract at OIT was

renewed in 1962 and again in 1963 and 1964, when she was promoted to the rank of Instructor II. In 1965, she received indefinite tenure and was promoted to the rank of Senior Instructor.

In 1971, Ms. Furby received a B.S. degree in health education from Oregon State University and she was promoted to the rank of assistant professor. She continued with her work in the Dental Department. In 1978, Ms. Furby received an M.Ed. degree in education with a health major from Oregon State University. Shortly thereafter she transferred from the Dental Department to the Biological Sciences Department in order to teach personal health, cardiopulmonary resuscitation (CPR), and first aid. She still teaches these three courses although she became a member of the Department of Nursing in

the Division of Health Technologies in 1982.

In 1969, Ms. Furby prepared materials for an accredited correspondence course for dental assistant certification through the American Dental Association. Those materials, which she revised in 1972, covered coursework for Introduction to Dental Assisting, Dental Anatomy, Oral Surgery and Endodontics, Oral Radiology, Dental Nutrition, Office Management, and Dental Health Education. Ms. Furby is a member of several professional societies including the National Association for Advancement in Health, the Oregon Health Education Committee, Southern Oregon and Northern California Emergency Medical Association, and the Oregon Heart Association. She has participated extensively in local activities such as

the Emergency Response Team on the OIT campus, the Klamath County CPR Drive, and the Klamath County Mental Health Developmental Disability Commission.

SALARY CLAIM

Ms. Furby claims that she was discriminated against because of her sex in that she was paid less than her male predecessor, Tillman Ogdahl, and is paid less than male faculty with similar job qualifications and experiences. The Board concedes that Ms. Furby has not progressed rapidly in salary but claims that the explanation is not sex related. The Board claims there are four reasons for Ms. Furby's relatively low salary: (1) she received her B.S. and M.Ed. degrees relatively late in her employment at OIT; (2) her performance has been below average; (3) her fields of dental assisting and health education

do not command as high a salary in the marketplace as other fields at OIT; and (4) she has not been promoted to associate professor and therefore has not received a promotion raise since 1971.

In support of her salary claim, Ms. Furby offers five comparators: Tillman Ogdahl, Gene Culver, Richard Strohkirch, Sherman Anderson, and John Bradley. Of these comparators, only Mr. Ogdahl has taught in her department. In support of her claim that she replaced Mr. Ogdahl at a substantially lower salary, Ms. Furby offered this statement in her direct testimony, which was presented by affidavit. "For the years 1977 through 1979, Mr. Ogdahl averaged $3,676 per year more than I did." Pl. Ex. 2694 p. 5. She also testified (by affidavit) that she had more years of service or a

higher academic degree than each of her comparators. However, Ms. Furby did not testify as to the number of years of service or highest academic degree of Mr. Ogdahl.

Ms. Furby's evidence regarding Mr. Ogdahl is totally inadequate to support any finding that Mr. Ogdahl is an appropriate comparator for Ms. Furby. There is no testimony from Ms. Furby that she replaced Mr. Ogdahl or that Mr. Ogdahl per formed the same job as she performed.[1] Ms. Furby has the burden of presenting a prima facie showing of discrimination. She has failed to present even the minimal facts necessary for a prima facie case with regard to Mr. Ogdahl.

Ms. Furby next claims that she was paid less than Gene Culver, Richard Strohkirch, Sherman Anderson, and John

Bradley for the years 1977 to 1983.[2] The evidence shows that Ms. Furby's salary was lower than these men throughout this period of time. See Pl. Ex. 412.

In order to make a prima facie case of sex discrimination based upon a comparison of work performed, Ms. Furby has the burden of proving that the actual job content of the positions held by her and her comparators is substantially equal and not merely similar. Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir. 1984). Ms. Furby asserts in her affidavit that she chose these men as comparators because their duties are or were similar to hers, and that she has either more years of service or a higher degree than each of them. In her cross examination, she testified as follows:

> Q [By Mr. Lidz] Am I right that here you did not -- you compared them [her male comparators] in terms of years of service and academic degree but you did not attempt to make any comparison of the quality of your performance as faculty members?
>
> A Well, I compared them because we were all teachers and most of us teach didactic and lab courses so to me a teacher is a teacher, you have to do your preparation, you have to do your objectives for each class, you have to teach the class, teach the labs and then of course evaluations on the students' testing.

(Tr. 8,547).

The Board contends that Ms. Furby's comparators do not perform work that is substantially equal to hers, and that in any case, legitimate factors relating to quality of performance, discipline, prior experience, and education account for the salary differences.

In order to determine whether the job of Ms. Furby and the jobs of her

comparators are substantially equal under Title VII, the court must make a case-by-case analysis based upon actual job content.

GENE CULVER

Mr. Culver joined the OIT faculty in 1960, one year before Ms. Furby. He has been a full-time research associate in the Geothermal-Heat Center for the past six years. He reports to the Dean of Administration, unlike teaching faculty, who report only indirectly to the Dean of Academic Affairs. Before he joined the Geothermal-Heat Center, Mr. Culver taught for 17 years in the Department of Mechanical Engineering Technology. He also served as department head for several years. At the Geothermal-Heat Center, Mr. Culver is engaged in full-time research supported by grant funds. He publishes a

great deal and does a significant amount of consulting work on geothermal energy matters with the private and public sector.

The court concludes based upon the differences in disciplines, funding sources, responsibilities, and qualifications, that Mr. Culver's position is not substantially equal to Ms. Furby's position and therefore Mr. Culver is not an appropriate comparator for Ms. Furby.

RICHARD STROHKIRCH

Mr. Strohkirch is a regular teaching faculty member of the Department of Medical Radiology Technology. Mr. Strohkirch joined the OIT faculty in 1972, eleven years after Ms. Furby. His initial rank was as an instructor. He was promoted to an assistant professor in 1976. Before joining the faculty at OIT, Mr. Strohkirch had been the chief

radiology technician at a hospital for four years and a staff radiologist at another hospital. His performance at OIT has been very good and he is the current head of his department. Mr. Strohkirch was promoted to associate professor in the spring of 1984. The courses he teaches are taught at a higher level than the courses Ms. Furby teaches.

Dr. William Smith, the Dean of Academic Affairs at OIT, was asked to compare the difficulty and the skills required to teach courses in the Department of Medical Radiology Technology with the courses in health education. Dr. Smith testified as follows:

> Q [By Mr. Lidz] How do you -- -can you compare the difficulty and the skills required to teach courses in medical radiology technology and -- on the one hand and health education on the other?

A Well, they're, of course, two entirely different disciplines with some similarity. However, the program in medical radiologic technology is a three-year program at OIT. I would have to characterize it by saying that the -- that the discipline is more challenging in general than health education. It's taught at a higher level.

The health education courses are predominantly at the freshman level. These go into junior level courses. The discipline is, in a sense, more specialized but also a very rapidly emerging and developing evolutionary discipline. In general, I would say it would be more intellectually challenging.

THE COURT: Is health education primarily a course that most people take? I mean, is it something that is a basic course that if you are a college graduate, you ought to have?

THE WITNESS: Yes, ma'am. There is a requirement in the Oregon State System of Higher Education that all of the Baccalaureate degree students will have had health education and physical education, yes.

THE COURT: Is there a difference between health education and the science program that you were just talking about, the X-ray and CAT scans and so forth?

THE WITNESS: Yes. This is a -- that's correct. The health education program is a requirement for all of the students before they earn their Baccalaureate degree. Medical radiologic technology is strictly a major degree. It's not a service course.

Q (By Mr. Lidz) Can you just clarify what you mean by a service course?

A A service course is one which is available to all students; and generally a service course is one in which there is not a major in the discipline, although that's not always true, but usually is.

Q Is there any major in health education at OIT?

A No.

(Tr. 20,234-235).

Positions that are deemed substantially equal for the purposes of pay require the same or substantially

equal levels of skill, effort, and responsibility. The court finds that Dr. Smith's testimony is credible and that Ms. Furby's position is not substantially equal to the position of Dr. Strohkirch. Dr. Strohkirch's position requires different skills, experience, and effort.

SHERMAN ANDERSON

Sherman Anderson joined the OIT faculty in 1969 as an assistant professor in the Department of Electrical Engineering Technology. He was promoted to the rank of associate professor in 1975. Mr. Anderson has a Bachelors degree and a Masters degree in electrical engineering. He received his Masters degree in 1954, 24 years before Ms. Furby received her M.Ed. degree. Mr. Anderson teaches predominantly upper division courses in electronics. Dr.

Smith testified that Mr. Anderson received a higher salary than Ms. Furby based upon the fact that he has received greater merit increases than Ms. Furby because he is a better performer than Ms. Furby; the discipline of electronics commands higher pay in the marketplace than the discipline of health education; and Mr. Anderson came to OIT with extensive experience in the electronics industry, which pays considerably higher salaries than salaries for dental assistants. Ms. Furby does not challenge Dr. Smith's testimony.

The court has recognized throughout this case that market considerations and performance are legitimate considerations in salary decisions. The court finds that Mr. Anderson is not an appropriate salary comparator for Ms. Furby.

JOHN BRADLEY

Mr. Bradley joined the faculty at OIT in 1978 as an assistant professor in the Department of Diesel Power Technology. He was promoted to associate professor and named department chair in 1981. Mr. Bradley received a Bachelors degree in industrial arts in 1966 and a Masters degree in power mechanics in 1971, both from San Diego State College. He received his Masters degree seven years before Ms. Furby received her M.Ed. degree. He had taught in a public high school for ten years and had been an instructor at San Diego State College for one year prior to coming to OIT. He had also had practical experience in the field of diesel power technology, but Ms. Furby had also had practical experience in the field of dental assisting. Dr. Smith testified that Mr.

Bradley is not an appropriate salary comparator for Ms. Furby because he teaches an entirely different discipline at the upper division level and is a department head. In addition, Dr. Smith testified that Mr. Bradley is a superb performer and that Ms. Furby is not.

Regardless of whether the differences in performance adequately account for the salary differences between Ms. Furby and Mr. Bradley, the court finds that Mr. Bradley is not an appropriate comparator for Ms. Furby.

Ms. Furby has offered no evidence of actual job content for her asserted comparators. The only evidence before the court as to job content was presented by the Board. The Board, not surprisingly, highlighted the differences in skill, effort, and responsibility between Ms. Furby's

position and that of her comparators. Salary differences alone are not adequate to support any inference of sex discrimination in the context of this case. Ms. Furby has the burden of showing that the actual job content of the positions is substantially equal, and she has not carried that burden.

The only evidence which may be deemed direct evidence of discrimination is a statement allegedly made in 1974 to Ms. Furby by a Dr. Wilson, her supervisor at that time. The statement was that Ms. Furby did not need a raise because her son was "out of the nest." Pl. Ex. 2694 p.4. Ms. Furby's son was attending college away from home. This statement is insufficient to prove sex discrimination.

Finally, Ms. Furby suggests that the system for merit increases at OIT has

resulted in discrimination. Ms. Furby claims that the "plus system" contains much subjectivity and that the administration has not been able to satisfactorily explain to teachers how the "pluses" necessary for merit increases are earned. (See Pl. Finding of Fact No.9). The only evidence presented by Ms. Furby in her case in chief was her affidavit and accompanying exhibits. There is no reference to the system for merit raises anywhere in this evidence and no rebuttal evidence was presented.[3]

Ms. Furby cannot prevail on her individual claim of salary discrimination.

PROMOTION CLAIM

Ms. Furby has applied for promotion to the rank of associate professor yearly since 1973 and has not been promoted.

She contends that she has not been promoted because of her sex, while men with comparable qualifications and experiences have been promoted. In support of her promotion claim, Ms. Furby relies upon the same five comparators as she did for her salary claim: Tillman Ogdahl, Gene Culver, Richard Strohkirch, Sherman Anderson, and John Bradley. Ms. Furby claims that despite the fact that their duties are (or were) similar to her duties, and despite the fact that she has either more years of service or a higher academic degree, each of these men has been promoted to the rank of associate professor.

The Board admits that Ms. Furby has not been promoted since 1971, when she became an assistant professor, but argues that the reason is not gender based. The Board claims that Ms. Furby has not been

promoted because of her lower-than-average performance, the undemanding nature of her job, and the receipt of academic degrees relatively late in her career. The Board argues that the promotion process at OIT is a competitive one and that Ms. Furby has simply been outperformed by other faculty members.

There are a limited number of promotions awarded annually at OIT because salary increases for these promotions come out of the general institutional budget, which is a limited budget. Roughly 8-10% of faculty are promoted each year, although a higher percentage are eligible by virtue of being minimally qualified. As a result, promotions are based upon a performance evaluation which goes beyond minimum performance required for promotion. According to Dr. Smith, the Dean of

Academic Affairs, promotions are competitive, and people with minimum qualifications tend not to be promoted. In 1980, for example, OIT required department heads to review for promotion all eligible faculty members. After this was done, the department heads then met with the associate deans (now called division chairpersons) to prioritize candidates for promotion by rank. The associate deans then met with the Dean of Academic Affairs where the list was again pared. Then the Rank Promotion Committee, a large committee composed of the Dean of Academic Affairs, five associate deans, five faculty members appointed by the faculty senate, and the student body president, reviewed the list and submitted a final prioritized list of promotion recommendations to the president. The president made the final

decisions on promotions.

In 1982, OIT deleted the requirement that all eligible faculty had to be considered. The committees which included the dean and associate deans were eliminated and the Rank Promotion Committee was replaced by a smaller Promotion Advisory Committee. Whatever the system, the process at OIT is a prioritized system in which faculty who are not recommended for further consideration at any given level will no longer be considered at the next level.

Ms. Furby presented no evidence in this case that the process as described affects women differently than men, or that women were discriminatorily not considered for promotion. Ms. Furby was, in fact, considered each year for promotion. Therefore, any discriminatory denials of promotion made before July 21,

1979, are time-barred. (See infra Law Applicable to Named Plaintiffs' Claims p. 5). However, discriminatory denials of promotion which may have occurred prior to July 21, 1979, will be considered by the court as it makes its ruling concerning discriminatory acts within the relevant time period.

Ms. Furby testified upon cross examination that a unanimous vote was necessary at each step of the process in order for a candidate for promotion to be considered further. She explained that in 1979, Dr. Don Karr, who was her department chair, was the only one who voted "Nay" in her case, thereby precluding her from any further consideration for promotion. She testified as follows:

> A I talked to Dr. Don Karr about this, who was my department chairperson at that

time, and I asked him why he voted nay, and I'm going to quote Dr. Karr by stating, "Well, you know, Furby, that's the way the political waves go."

Q [By Mr. Lidz] And is it again your belief that everybody else here was in favor of your promotion except Dr. Karr, who was opposed to it?
A Yes. That's the way it was explained to me.

Q And Dr. Karr in that year was your department chair; is that correct?

A Yes. He said he just had to vote that way because there were four males -- three males running besides myself and they just had to be promoted over and above me.

Q Well, do you know who these other four people were who were listed as confidential?

A I'm not real sure.

(Tr. 8,569-570). As proof that Don Karr thwarted her opportunity to be promoted in 1979, Ms. Furby submitted exhibit 456, which follows this page.

Dr. Karr testified, however, that his "Nay" vote on the 1979 promotion recommendation reflects his disagreement with the committee's decision to recommend four other individuals for pro motion rather than Ms. Furby. Dr. Karr stated that he does not recall ever having said, "That's the way the political waves go," and denied saying that he "just had to vote that way" because there were three males aside from Ms. Furby who "just had to be promoted over and above" her. See Def. Ex. 8133; affidavit of Don J.Karr.

A plain reading of exhibit 456 shows that Dr. Karr voted against the recommendation, which was not to consider Ms. Furby further for promotion. Dr. Karr's "Nay" vote is a vote in favor of Ms. Furby, while three women and two men voted against her - that is, not to

recommend her for promotion. Dr. Karr's "Nay" vote is no evidence of sex discrimination against Ms. Furby and casts serious doubt upon her assertion that Dr. Karr made any statement that he voted for a man over her.

BEST

Date: June 30, 1980

To: All Staff in the Office of the Vice President for Finance and Administration

From: James T. McGill JTMc

Subject: Organizational Changes

UCHSC
Health Sciences Center
Portland

Effective July 1, 1980, the following reporting lines are established:

Vice President for Finance & Administration	James T. McGill
Assistant Vice President, Budget & Finance	James T. McGill (Acting)
Budget Office	Richard A. Stolz (Acting)
Research Services	Abdul O. Anani
Accounting	Bruce W. Palmer
Assistant Vice President, Facilities Management	Ralph E. Tuomi
Physical Plant	Ralph E. Tuomi
Facilities Planning	Gordon H. Ranta
Security	Richard C. Anderson (Acting)
Parking	Warren E. Davis
Instrument and Safety Service	George I. Johnston
Assistant Vice President, ~~Fiscal~~ Business Management	M. R. Parelius (Acting)
Auxiliary Services	Ann L. Hoffstetter
Purchasing	Shirley J. Carey
Payroll	Irene Fulmer
Business Office	Cecil B. Burt
Accounts Payable	Phyllis Seid
Animal Care	Allan L. Rogers
Inventory and Surplus	G. Marvin Stephens
Student Activities Building	Benjamin R. Jensen
Assistant Vice President, Information Systems	M. R. Parelius (Acting)
Systems Development	TBA
Technical Support	George I. Johnston (Acting)
Assistant Vice President, Management Services	M. R. Parelius
Affirmative Action	William W. Jackson
Internal Audit	Hilton A. Talbert
Personnel	Bill R. Kribs
Contracts	Howard J. Dahlstrom
Special Projects	Monte R. Mullen

Circle added by the court

Please note that this display represents the reporting relationships of existing units. The organizational structure will be under continued review and is subject to change in the future.

JTM:mjh

Page 6 - Ms. Hoffstetter
Page 336 - OPINION

DEFENDANT'S EXHIBIT 4509

AVAILABLE COPY

The Board asserts that Ms. Furby has not been promoted over other faculty members because the subject matter she teaches is not competitive and her performance has been substandard. Ms. Furby teaches CPR and first aid, mostly at night and on week-ends. Ms. Furby and Wendy Gammons both teach personal health which is a required lower division course. Dr. Smith, Dean of Academic Affairs, testified as to Ms. Furby's teaching performance, professional development, and service to the institution:

> Q [By Mr. Lidz] Can you evaluate Miss Furby's teaching performance generally? That is, in personal health, first aid and CPR? And if you need to, break it down among the three courses?
>
> A She does very badly in the course on personal health, as indicated by student evaluations. In the areas of first aid and CPR, her student

evaluations are a little bit better. But overall, I would have to classify Mrs.Furby as one of our substandard instructors.

Q How does Wendy Gammins do with the personal health course in terms of student evaluations?

A Very well.

Q Have you personally received any feedback concerning Miss Furby's teaching?

A Yes, a considerable amount.

Q Can you -- without going into detail, can you characterize it?

A I don't think that a term goes by that I do not have one or more students in my office to complain about Mrs.Furby's instruction.

Q How do you evaluate Miss Furby in terms of her professional development?

A She does very well in professional development in the areas of first aid and CPR. Beyond that, she doesn't do a great deal. She does maintain licensure and does attend workshops and conferences in those areas.

Q How do you evaluate her in terms of service to the community?
A Again, in those two areas of her interest, she does very well. She makes a number of contributions.

Q And how about service to the institution?

A Service to the institution, unfortunately, has been very limited.

Q Do you have an opinion as to why that is?

A Part of it is her health.

A second factor has been a rather unusual teaching schedule. Mrs. Furby is not to be found on campus during the day a great deal of the time, partly because her -- many of her first aid or CPR courses are taught during the evenings or occasionally on Saturdays.

I think a third factor, up until recently, has been her lack of interest in serving on committees or com missions. I believe two years ago she, for the time that I can recall, did request an assignment to a committee.

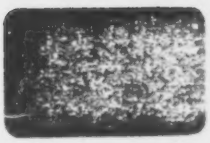
(Tr. - 20,212-13).

In support of her sex discrimination in promotion claim. Ms. Furby offered into evidence Pl. Ex. 445, 456 and 446 which follow this page. These are various recommendations for promotion. Ms. Furby's promotion claim is difficult to evaluate because there is no evidence as to who was promoted in the years that Ms. Furby was not promoted. Since OIT limits the number of promotions each year for fiscal reasons, a faculty member may be well qualified for promotion any given year and yet not be promoted because others are more qualified or perform at a higher level.

BEST AV

Table 2 a

OREGON INSTITUTE OF TECHNOLOGY
KLAMATH FALLS, OREGON 97601
TELEPHONE 503/ 882-6321



May 20, 1982

EXHIBIT 12-B

Ms. Catherine Furi
Associate Dean
Allied Health Division
Oregon Institute of Technology
Klamath Falls, OR 97601

Dear Catherine:

It is a pleasure to write on behalf of Lorraine Furby in support of her promotion to Associate Professor. Lorraine is highly dedicated to the teaching of CPR and First Aid and constantly attending conferences in order to maintain her numerous certifications. In addition, Lorraine's contribution in the community sector has been prodigious--just one example is the hundreds of Klamath residents whom she has taught CPR as a part of a county-wide drive.

It should be mentioned that while Lorraine's student evaluations are not exemplary, there are some extenuations--CPR and First Aid are Lorraine's forté, yet it is not possible to have them evaluated as they are offered on Saturdays and evenings. Thus, her only evaluations are in the large, and sometimes even hostile, Personal Health sections where it is extremely difficult to obtain a reasonable evaluation.

In addition to her dedication as an instructor, Lorraine's professional development is voluminous: she is currently doing research in Industrial Safety, and her expertise in that area has resulted in her being invited to present a paper at the University of Utah--quite an honor indeed.

Summarily, one has to note that Lorraine has been an Assistant Professor for ten years. She is deserving of the promotion and I hope and urge that it finally be awarded to her.

Sincerely,

David G. Korzan, Ph.D.
Department Chairman
Biological Sciences and Chemistry

bjy

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Table 2 b

OREGON INSTITUTE OF TECHNOLOGY
KLAMATH FALLS, OREGON 97601
TELEPHONE (503) 882-6321

February 18, 1981

EXHIBIT 12-M

Ms. Catherine Puri
Associate Dean
Division of Allied Health
Oregon Institute of Technology

Dear Catherine:

REGARDING: RANK PROMOTION, LORRAINE FURBY

I would herein like to recommend Lorraine for promotion to the rank of Associate Professor. She is an interesting addition to our group, adding unique balance to our department. It would be difficult to imagine a more dedicated individual when it comes to teaching Health/First Aid courses, and this year her enthusiasm has resulted in somewhat improved student evaluations, which are always difficult in the large Personal Health sections. In addition, Lorraine's professional development, of late, has been prodigious with her attendance of numerous conferences and workshops. Finally, she has made a significant contribution to the OIT and local communities both, with her extensive participation in the Emergency Response Team on campus, as well as with the county CPR drive.

Sincerely,

David G. Korzan, Ph.D., Chairman
Biological Sciences and Chemistry

sah

EXHIBIT 12-C p. 3

Professional Development:

Attended National Association for EMT, 1981
Updated the following cards to current 1982 status: First Aid, Oregon Heart and Red Cross, Multi-Media, EMT certification
Emergency Medical Meeting, Agate Beach, May 7-9, 1982
Special day class, Death and Dying, 1982

I will be starting classes in the Nursing Department as I ultimately want to become an RN, so that I can obtain summer employment since there doesn't seem to be much in summer school teaching.

Department Chairperson's General Descriptive Comments:

Remarks by Dave Korzan (quote):

Lorraine does a commendable job with her First Aid and CPR courses and makes a viable contribution to the community in these areas.

Remarks by C. Puri (quote):

Obviously takes great pride in keeping up to date in the state-of-the-art in her courses.

Remarks by W. Smith (quote):

I concur!

Associate Dean's General Descriptive Comments:

I would like to recommend Lorraine Furby for promotion to Associate Professor. Lorraine has been most cooperative and flexible in helping to meet changing needs in health related education at Oregon Tech. For many years she made a considerable contribution to the Dental Assistant program. After completion of a Master's degree in Health Education Lorraine moved into the area of Health Education, C.P.R., First Aid, and E.M.T. training, and has apparently found her niche! As Dr. Korzan points out, she is indefatigable in pursuit of all the many certificates necessary to keep current in the latter three areas. Her contribution to this division is truly appreciated.

Catherine M. Puri
Associate Dean
Division of Allied Health

BEST AVAILABLE COPY

There is no evidence in this case that the process of limiting promotions is related in any way to sex or falls differently upon women. On the contrary, the Board presented evidence that male faculty members have remained in the rank of assistant professor for long periods of time. For example, John Anderson was an assistant professor in 1966 and remains an assistant professor to the present; Dale King, an assistant professor from 1966-1984; Neil Garrett, an assistant professor from 1970 to the present; Richard Rath, an assistant professor from 1973 to the present. Ms. Furby does not contradict or otherwise challenge the Board's claim that men also remain in the rank of assistant professor for long periods of time at OIT.

Ms. Furby claims that her five comparators were promoted to associate professor while she remained an assistant professor. Mr. Ogdahl was never promoted to associate professor. As to the other four, Mr. Strohkirch was promoted to associate professor in 1984; Mr. Anderson was promoted to associate professor in 1975; Mr. Bradley was promoted to associate professor in 1981, and Mr. Culver was appointed to associate professor in 1960. Each of these faculty members is employed in a different discipline than Ms. Furby -- medical radiology, electrical engineering technology, or diesel power technology. The court has no facts regarding the promotions of these men. Ms. Furby has the burden of proving her case.

The court is satisfied that Ms. Furby's failure to achieve the rank of

associate professor is because she is an average performer, and her contributions to the OIT campus and to teaching have not proved competitive.

Ms. Furby cannot prevail on her individual promotion claim.

Ms. Furby Footnotes

1. The Board presented the following evidence regarding Mr. Ogdahl: He taught health education and was assistant foot ball coach at OIT from 1974 through the fall of 1979. He completed his Masters degree in 1948, 30 years before Ms. Furby, and had completed all the coursework toward his doctorate. He came to OIT with 20 years' teaching and coaching experience at Willamette University where he last held the rank of associate professor. He was initially hired at OIT as an assistant professor.

2. Ms. Furby's Proposed Findings of Fact Nos. 5 and 7 assert allegations of salary differences between Ms. Furby and two additional male faculty at OIT, William Johnson and Charles Selleck. The court has found no evidence concerning either of these individuals in Ms. Furby's case in chief. The court is not at liberty to make findings for which a plaintiff has presented no evidence.

3. The Board offered evidence that merit increases are directly correlated to a faculty member's annual performance evaluation on the Faculty Annual Merit Evaluation (FAME) or Annual Performance Evaluation (APE) forms. On these forms faculty members receive numerical scores on their performances in each of their areas of responsibility. The scores are added, and a certain number of pluses are awarded according to the total points received on the FAME or APE form. (See Def. Ex.8034, pp.57-60, 68-69). When the merit increases are awarded, a dollar

value is assigned to each of the pluses. The dollar value of each "plus" is determined on a department-by-department basis, so that department heads cannot increase the share of merit money to be allocated to their departments simply by giving everyone in their departments maximum scores. Ms. Furby has not identified any manner in which this method of determining merit increases has discriminated against her because of her sex or any other factor that is not a legitimate basis for salary determination.

MARGARET HUNTLEY

Margaret Huntley, an associate professor in office systems technology [formerly secretarial science technology] in the Division of Business Technology at the Oregon Institute of Technology (OIT), claims that she was discriminated against because of her sex in that (1) she has received a lower salary than equally qualified men who perform substantially the same job as she performs and (2) she was not promoted to associate professor until 1983, while men, who were equally qualified were promoted to associate professor in 1981 and 1982.

Ms. Huntley received a B.S. degree in business from Oregon State University in 1971 and an M.B.E. degree in business education from North Texas State

University in 1974. Prior to coming to OIT in 1975, Ms.Huntley had been a high school teacher (3 years), a legal secretary (2+ years), and a secretary in an insurance company and at Oregon State University (2+ years).

Ms. Huntley became employed at OIT in January, 1975, on a half-time basis as an instructor to help develop courses in legal and secretarial "options", which were to be offered in the fall of 1975. (Tr.7,566). She also taught "refresher" shorthand and some night courses. In the fall of 1975 she became employed full time at the rank of instructor. In 1977, Ms. Huntley was promoted to assistant professor and then to associate professor in 1983. She was placed on a tenure track position in 1982.

Since coming to OIT, Ms. Huntley has taught typing, shorthand, legal office procedures, medical typing and transcription, and applied office practice. She has served on the Faculty Senate, on Women's Day committees, the College Discipline Commission, and numerous search committees and faculty welfare committees. She has assisted with Parents Weekend, Career Day, the speech contest, and the annual business skills contest. She is presently an adviser to the medical secretarial students.

John Smith, Dean of Administration at OIT, testified to Ms. Huntley's performance as follows:

> Q [By Mr. Lidz] And in general terms how would you rate her performance as a faculty member?
>
> A I think she's a very good faculty member.

(Tr. 18,724). Dr. Smith also testified that Ms. Huntley had been a willing and effective contributor to her division and had done her share of community service. Ms. Huntley is not, however, current in computer applications and would not meet the criteria for recent openings in the area of office systems technology.

PROMOTION CLAIM

In 1980, 1981, and 1982, Ms. Huntley was recommended for promotion to the rank of associate professor by her department and the Dean's Committee or Promotion Advisory Committee. However, she was not promoted by the college president until 1983. Ms. Huntley claims she was not promoted in 1981 and 1982 because of sex discrimination.

In 1980 and 1981, OIT required department heads to consider all

eligible faculty for promotion. Department heads would then meet with their associate deans (now called division chairpersons) to prioritize candidates for promotion to each of the various ranks. The associate deans would then meet with the Dean of Academic Affairs and narrowed the list of names forwarded to the Rank Promotion Committee for further consideration. The Rank Promotion Committee was a large committee composed of the Dean of Academic Affairs, the five associate deans, five faculty members appointed by the faculty senate, and the student body president. The Rank Promotion Committee then submitted a prioritized list of promotion recommendations to the president. At OIT, the number of promotions that can be made in any year

is limited. Not all eligible faculty can expect to be promoted.

In 1982, OIT made three changes in the promotion procedure: (1) it deleted the requirement that all eligible faculty had to be considered for promotion; (2) it eliminated the Dean and Associate Dean's Committee; and (3) it replaced the Rank Promotion Committee with a smaller, less cumbersome committee called a Promotion Advisory Committee.

Ms. Huntley became eligible for promotion to the rank of associate professor in 1980. She was one of 28 faculty reviewed by the Dean and Associate Dean's Committee. She was not one of the eleven persons selected for further consideration by the Rank Promotion Committee. Ms. Huntley does not claim sex discrimination with regard to the 1980 denial of promotion.

In 1981 Ms. Huntley was again eligible for promotion to the rank of associate professor. That year the Dean and Associate Deans' Committee considered 25 faculty with the rank of assistant professor for promotion to associate professor. The Rank Promotion Committee recommended to the president that eight faculty members be promoted from assistant professor to associate professor. One of the faculty members recommended was Ms. Huntley. However, the Rank Promotion Committee prioritized the names and Ms. Huntley ranked number seven. The President of OIT promoted five of the faculty members whose names were submitted to him by the Rank Promotion Committee. Ms. Huntley was not one of those promoted.

In 1982, after the promotion procedure was streamlined, the Promotion

Advisory Committee recommended seven people to the president for promotion to associate professor. The list of people recommended was not prioritized. Four of the seven were promoted: Charles Harris, Jerald Norman, Eric Peterson, and Edward Selling. Three were not promoted: Ms. Huntley, Richard Strohkirch, and Richard Zbinden. However, Ms. Huntley, Mr. Strohkirch, and Mr. Zbinden each received a $500 increase in their salary along with notifications that they would not receive promotions.

Ms. Huntley claims that the president did not grant her promotions in 1981 and 1982 because of her sex. The Board claims that the promotion decisions were based upon the candidates' year of hire, year of highest degree, highest degree, length of time spent in the rank of assistant professor, and

prior service before coming to OIT as well as more subjective factors such as quality of teaching and service to the institution and the community.

Ms. Huntley's comparators for her sex discrimination in promotion claim are Charles Harris, who was promoted to the rank of associate professor in 1982, and Thomas Bradley and Robert Mitchell, who were promoted to the rank of associate professor in 1981. Ms. Huntley does not claim that discrimination was involved in the promotions of Mr. Norman, Dr. Peterson, and Dr. Selling.

Charles Harris

Mr. Harris, like Ms. Huntley, has an M.S. degree. He was hired at OIT in 1976, one year after Ms. Huntley, as an assistant professor. (Ms. Huntley was an instructor until 1977.) Mr. Harris,

then, had one more year in rank, while Ms. Huntley had one more year of service at OIT. Mr. Harris received his M.S. degree in 1969. (Ms. Huntley received her M.B.E. degree in 1974.) Mr. Harris had had approximately 24 years of industrial and teaching experience before coming to OIT. (Ms. Huntley had had approximately eight years of vocational work and teaching experience before coming to OIT.) Mr. Harris is in the Department of Diesel Power Technology.

Thomas Bradley

Mr. Bradley was hired as an Assistant Professor in the Department of Diesel Power Technology in 1978, three years after Ms. Huntley was hired. He received a bachelors degree in 1966 and a masters degree in 1971. When he joined the OIT faculty, he had had two years of

college level teaching experience, 13 years of high school level teaching experience, and approximately seven years of industrial experience. Mr. Bradley is one of the "stars" at OIT. The Dean of Academic Affairs at OIT, Dr.William Smith, testified as follows regarding Mr. Bradley:

> Q [By Mr. Lidz] What distinguishes Mr. Bradley as a faculty member, if anything?
>
> A In his case there are a number of things that are distinguishing. First of all, he's a workaholic. Mechanically he's a genius. He is probably the most knowledgeable person on all of our faculty and that includes the group of very considerably knowledgeable people with respect to equipment operation, maintenance, repair. The man actually can fix anything that I have ever encountered. He serves as our surplus property, federal surplus property coordinator. Therefore, we have capitalized on that experience very well. He screens surplus property for

us and coordinates its being brought to campus.

He's an excellent department head. And he's truly an outstanding instructor.

(Tr. 20,187).

Robert Mitchell

Mr. Mitchell joined the OIT faculty in 1975, the same year as Ms. Huntley, as a mathematics/physics teacher. His appointment, however, was at the rank of assistant professor. He received a bachelors degree in 1966 and a masters degree in 1970. He has completed all of the coursework for his Ph.D. degree. Before he came to OIT he taught at Nashville Technical Institute for several years as an associate professor of physics. He had also been a research assistant at Washington State University and had had extensive industrial experience. As to Mr. Mitchell, Ms.

Huntley testified on cross- examination as follows:

> Q [By Mr. Lidz] And he [Mr. Mitchell] also -- you mentioned that he had been promoted . . . in 1981; is that right?
>
> A Correct.
>
> Q And he is noticeably older; is he not? I don't have his age in front of me, but --
>
> A I -- I guess he is older than I am.
>
> Q Yeah okay. Am I right, also -- do you know that he had experience teaching as -- at the associate professor level in Nashville before he came to OIT?
>
> A I wasn't aware of that until just this last year when I reviewed his file.
>
> Q So you do know he was an associate professor at, I think it's Nashville State Technical Institute for two years?
>
> A Yes.
>
> Q And he had also taught there at the assistant professor level before being an associate professor?

A The information I had was that he spent five years as a research assistant, one year as a teaching assistant, and then had five years at the associate degree level.

Q At the associate professor level?

A Uh-huh. Is that wrong?

Q No, I -- well, my notes said two years and other experience at the assistant professor level. But he had --he started at OIT as an assistant professor?

A Correct.

Q Even though he had been an associate professor somewhere else before?

A That -- yes, that would be correct.

Q Would that seem to you to explain partly -- at least partly why he may have been promoted before you were?

A I think it could.

(Tr. 7,641-642), (emphasis added).

There is no direct evidence of sex discrimination against Ms. Huntley. Two

men as well as Ms. Huntley were denied promotions in 1982. Ms. Huntley received a promotion in 1983 after six years in the rank of assistant professor -- an average length of time. Ms. Huntley admitted on cross examination that there were numerous men who had never been promoted to associate professor --- Eric Wakkuri, Carl Steidley, Harold Godfrey -- to name some of them. Ms. Huntley testified to instances where women were promoted and men were not. There is simply no evidence in the record to support Ms. Huntley's claim that she was discriminated against because of her sex when she failed to receive a promotion in either 1981 or 1982.

SALARY CLAIM[1]

In her proposed Findings of Fact Ms. Huntley asks the court to make the following findings regarding her salary:

8. For comparison, Mr. Naseth (general studies), Mr. Wakkuri (math), Mr. Mitchell (math/physics), and Mr. Steidley (math) all came to OIT in 1975, all have masters degrees, and all had teaching duties similar to Ms. Huntley's. In 1980 Mr. Naseth's salary was $18,360, Mr. Wakkuri's was $17,307, Mr. Mitchell's was $23,041 and Mr. Steidley's was $19,912. Mr. Furlong and Mr. Isensee both taught in the business division with Ms. Huntley. Mr. Furlong came to OIT in 1981 and has an M.A. Mr. Isensee has a B.A. (and is a C.P.A.). Both had similar teaching duties to Ms. Huntley's during the periods in question. In 1980, Mr. Isensee's salary was $24,456. In 1981 Mr. Furlong's salary was $22,000.

. . .

10. Ms. Huntley was discriminated against on the basis of her sex in that she received a lower salary than males of comparable qualifications who were performing substantially the same work she was performing.

Pl. Proposed Findings of Fact 8 and 10.

The court will first address Ms. Huntley's salary claim as it relates to

Donald Isensee and Peter Furlong, because both of these men taught in the Division of Business Technology with Ms. Huntley.

Mr. Isensee is a certified public accountant whose starting salary at OIT in 1978 was $18,000. His last salary in the private practice of accounting was $26,000. Ms. Huntley's starting salary at OIT in 1975 was $10,782. Her last salary as a high school teacher was $9,000, which was the salary that she stated as her expected starting salary on her employment application form. Mr. Isensee has resigned from OIT and is now a comptroller for a large company. His annual salary is somewhere between $30,000 and $40,000. Ms. Huntley's salary is (or was at the time testimony was taken) $22,490. Ms. Huntley's

division chair, Don Gordon Ward, testified as follows:

> . . . I think very few office managers in Klamath Falls would make $22,500 on a twelve month basis, and her [Ms. Huntley's] salary is based on a nine month basis. So there is, I think -- it is substantially higher than you could get for similar professional work in the com munity.

Tr. 18,825-826.

Mr. Furlong is also a certified public accountant. Unlike Mr. Isensee, who has only a bachelor's degree, Mr. Furlong has an M.B.A. He taught at OIT for only two years, the 1980-81 and 1981-82 academic years. He came to OIT with four years experience as a senior bank examiner for the federal government, two years experience as a certified public accountant, and four years of college level teaching experience. Mr. Isensee taught

Principles of Accounting and Introduction to Accounting. Mr. Furlong taught Managerial Accounting, Income Tax, and Principles of Accounting. Ms.Huntley teaches Medical Office Procedures, Legal Office Procedures, Stenography and Medical Typing.

Mr. Isensee and Mr. Furlong are not appropriate salary comparators for Ms.Huntley. Their educational backgrounds, prior experiences, and teaching positions within OIT are different. Whether it is "right" or not, there was evidence presented that the discipline of accounting commands a greater monetary reward than the discipline of secretarial science. OIT competes in the marketplace for people with these skills. To do so OIT must necessarily pay accountants on its

faculty higher salaries than it pays secretaries on its faculty.

The four other men that Ms. Huntley has named as salary comparators - Gary Naseth, Eric Wakkuri, Carl Steidley and Robert Mitchell - were hired in 1975. The chart on the following page gives information regarding Ms.Huntley and these comparators.

Dr.William Smith, the Dean of Academic Affairs at OIT, explained the beginning salary differences between

TABLE 1a

Name	Salary 1975-76 Academic Year	Salary 1980-81 Academic Year Pl. Ex. 501	Highest Degree and Year Obtained	Rank at Hire	Area of Specialization	Prior College Teaching
Huntley	$10,782	$16,939	Masters 1974	Instructor	Office Systems Technology or Secretarial Science Technology	None (3½ yrs. high school)
Naseth	$12,500	$18,360	Masters 1972	Instructor	General Studies	2 yrs. Western Wash. State College

Table 1b

Name	Salary 1975-76 Academic Year	Salary 1980-81 Academic Year Pl. Ex. 501	Highest Degree and Year Obtained	Rank at Hire	Area of Specialization	Prior College Teaching
Wakkuri	$11,700	$17,307	Masters 1974	Instructor	Mathematics	None (6½ yrs. high school
Steidley	$12,906	$19,912	Masters 1973	Asst. Professor	Mathematics	Santa Monica College + high scho
Mitchell	$17,000	$23,041 (Tr. 7594)	Masters 1970 + all coursework completed for Ph.D. degree. Status is ABD (all but dissertation).	Asst. Professor	Math/physics	4 yrs. Nashville State Technical Institute (part of time as associate professor

Ms. Huntley and Mr. Naseth, who teaches general psychology, on the basis that he had received his masters degree two years before Ms. Huntley received her masters degree. Mr. Naseth also had college level teaching experience at Western Washington State College and had been a course administrator in the Psychology Department for two years.

Dr.Smith explained the beginning salary differences between Ms. Huntley and Mr. Wakkuri, who teaches algebra and trigonometry, on the basis that he had had more years teaching high school than Ms. Huntley, and mathematics, Mr. Wakkuri's discipline, commands higher pay than secretarial science, Ms. Huntley's discipline.

As to Mr. Steidley, who taught Abridged Physics and General Physics. Dr.Smith testified as follows:

Q [By Mr. Lidz] Dr. Smith, can you describe Mr. Steidley's OIT experience in terms of what would be significant to you or to OIT in hiring him?

A Almost all of the positions that he had prior to coming to OIT were relevant to our type of institution. He taught at Litton Industries as a senior engineering instructor. He taught at -- taught mathematics at Santa Monica College. He had high school teaching experience. He worked with a firm in Falls Church, Virginia, as an electronic systems engineer. He worked with Philco Corporation as a field engineer. He had some experience with -- as a tab operator with Capitol Radial Engineering Institution in Washington, D.C., so that all of his background related to the type of institution that OIT happens to be.

. . .

Q Do you have an opinion as to why Mr. Steidley would be hired at more than -- $2,000 more than Ms. Huntley in 1975?

A Well, again, because of his experience predominantly. That is degrees earlier, both

teaching and comprehensive industrial experience.

(Tr. 20,204-205).

As to Mr. Mitchell, who teaches Optics, Introduction to Physical Science and General Physics, Dr. Smith testified as follows:

> Q [By Mr. Lidz] Can you explain why there's more than a $6,000 difference between his starting salary and that of Margaret Huntley?
>
> A Well, the difference in his case would have been experience. He had been an associate professor at another college, he had his degrees earlier, he had all but his dissertation completed for the doctorate. He had both industrial experience and a good deal of college teaching experience.

(Tr. 20,207).

There is no direct evidence of sex discrimination against Ms. Huntley. Starting salaries at OIT are set in accordance with a candidate's highest

degree, the amount and the type of experience the candidate brings to the college, the existing salary rate in the department or division, the candidate's previous salary and the candidate's discipline. Using these standards, the court finds that Ms. Huntley's starting salary of $10,782 was an appropriate salary given her skills, her experience, and her previous salary of $9,000 as a high school teacher.

Salary increases at OIT are across-the-board increases and merit increases. In addition, special raises are given on occasion for reasons such as equity, completion of an advanced degree, or some unusually meritorious service. Faculty at OIT receive a five percent increase for each promotion. At the present time, Ms. Huntley's salary exceeds that of Mr. Naseth and Mr. Wakkuri as a result of

merit and promotion increases she received. Mr. Steidley is no longer employed at OIT.

Ms. Huntley's raises have been better than most faculty in her division and better than most of her comparators. Lastly, Ms. Huntley's salary claim is basically a comparable worth claim. She claims that teachers of Secretarial Science - Business Technology should be paid the same salary as teachers of Accounting, Physics, Psychology and Mathematics. There has been no showing that the positions in these disciplines require substantially the same skills, effort, and responsibilities. Without evidence of substantially equal job content, this issue is foreclosed by Spaulding and the court's order of August 10, 1984.

Ms. Huntley Footnotes

1. Since Ms. Huntley does not make any claims about her annual merit evaluations and the salary increases based on those evaluations or the percentages of salary increases that she has received since the time of her hire, Ms. Huntley's salary claim is deemed to be predicated on her starting salary.

PORTLAND STATE UNIVERSITY

PORTLAND, OREGON

Bernice Gilmore

Betty Leonard

Dr. Elaine Spencer

Dr. Barbara Stewart

Michele Wollert

BERNICE GILMORE

Bernice Gilmore, a retired assistant professor of chemistry at Portland State University (PSU), filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) on May 1, 1980. Ms. Gilmore claims that she was discriminated against because of her sex in that she received less pay and less retirement benefits than equally qualified men performing substantially the same job. Ms. Gilmore received a Right to Sue Letter from the EEOC dated August 8, 1980.

SALARY CLAIM

Ms. Gilmore was first employed at PSU (then Portland State College) in September, 1959, the same year she had received a BS degree in general science from PSU. She was employed as an instructor to handle the laboratory

aspects of the chemistry classes. From 1961-1963 she taught a lecture course in chemistry for engineers. In 1963-64 Ms. Gilmore was on educational leave from PSU. She received an M.A. degree in teaching (as opposed to an M.A. degree in chemistry) from Cornell University. In 1965 she returned to PSU and taught a general chemistry course to liberal arts majors, as well as continuing her laboratory work. She was also promoted to assistant professor in 1965. In 1966 she received a legislative monetary award for excellence in teaching. This award was based almost entirely upon student evaluations. Her peers considered her to be an average teacher.

In the mid-1960's, as a part of its preparation for the transition from "college" to "university," several new faculty members with Ph.D. degrees in

chemistry were hired. A new policy was also initiated: all lecture courses in chemistry were to be taught by persons having Ph.D. degrees in chemistry. This new policy was designed to upgrade the quality of education provided to chemistry students. Ms. Gilmore, who has no degree in chemistry, was again assigned to teaching chemistry laboratory classes, where she continued until her retirement in 1982.

Ms. Gilmore claims that in 1961 her supervisor told her that she did not need a merit pay increase because her husband was employed. In 1961 sex discrimination was not unlawful; however, she contends that since most pay increases at PSU are percentage of salary increases, a discriminatory denial of a pay increase to her has a continuing effect on salary into the

years when sex discrimination is unlawful. She also contends that in 1965 one of her male colleagues received a $1000 merit raise and one of the reasons given by her supervisor was that the colleague's wife was pregnant.

As to the merit pay issue, the only evidence Ms. Gilmore presented is as follows:

Q (by Mr. Willner) In 1961 or 1962 did you have a discussion with the then department chair, Dr. Ferguson, concerning your merit pay?

A Yes, I did.

(Objection and discussion - objection overruled)

Q What did Dr.Ferguson say to you when you discussed with him the subject of merit pay?

A That I did not need the money, that my husband was working.

(Tr. 5433-34)

Ms. Gilmore presented no evidence either before or after this testimony to

show that she was entitled to a merit pay increase or that merit pay increases were even given in 1961 or 1962.

The only evidence presented by Ms. Gilmore that a male colleague received a $1000 merit increase in 1965, partially because his wife was pregnant is as follows:

Q (by Mr. Willner) And what did department Chair Ferguson tell you about the merit raise for Mr. Boster?

A Mr. Boster received a thousand dollar merit raise and the first reason that Dr. Ferguson gave me was that his wife was pregnant.

Q All right.

A My response was I didn't have to get my spouse pregnant, I could do that job all by myself.

Q You yourself had raised some children?

A Yes. I had two sons.

(Tr. 5437)

The defendant presented uncontradicted evidence that Mr.

Boster's salary from 1960-1966 was as follows:

1960-61	$5,000
1961-62	5,400
1962-63	6,000
1963-64	6,500
1964-65	6,500
1965-66	7,000

(Def. Ex. 8101). Clearly, during the year claimed by Ms. Gilmore, Mr. Boster never received a $1000 raise for any reason -- merit, promotion, across-the-board, or because his wife was pregnant.

PROMOTION ON RETIREMENT CLAIM

Ms. Gilmore contends that Cecil Sanford and K. Ellsworth Payne, equally qualified males performing substantially the same job as she performed, were given promotions upon retirement, and she was not given a promotion upon retirement because of her sex. Receiving a "courtesy" promotion upon retirement is important because it increases the salary upon which retirement benefits

are calculated. However, promotion upon retirement is not given routinely or ordinarily anywhere in the state system of higher education.

Mr. Sanford was a physics professor, and Mr. Payne was a biology professor. Prior to their retirement Mr. Sanford was an assistant professor and Mr. Payne was an associate professor. Mr. Sanford's duties were primarily in the physics laboratory. Mr. Payne taught courses entitled The History of Sciences and Vocabulary for Scientists, courses he designed himself, and he also had laboratory duties. Both Mr. Sanford and Mr. Payne had bachelor's degrees. Mr. Sanford's request for promotion upon retirement was presented to the Promotion and Tenure Committee of the Physics Department. Mr. Payne's request for promotion upon retirement was presented

to the Promotion and Tenure Committee of the Biology Department. The Physics Department and the Biology Department at PSU have different expectations and requirements for promotion and tenure from each other and from the Chemistry Department. No department plays a role in the promotion decisions of other departments.

Ms. Gilmore's application for promotion upon retirement was submitted by the Chemistry Department Chairman to the Chemistry Department Promotion and Tenure Committee. At the time of Ms. Gilmore's request for promotion upon retirement, the Chemistry Department Promotion and Tenure Guidelines stated that a Ph.D. degree is normally required for promotion. Absent a Ph.D. degree, outstanding abilities must be shown before a faculty member will be

promoted. No faculty member in the Chemistry Department had ever received a "courtesy" promotion upon retirement.

Ms. Gilmore has two complaints. First, she complains Mr. Sanford and Mr. Payne are paid more than she. Second, she complains that these two men received courtesy promotions upon retirement, while she requested one but was refused. Ms. Gilmore bears the burden of showing that these differences in treatment were because of her sex. She has failed to meet that burden. Although Ms. Gilmore's two comparators were laboratory instructors, they were not in the same department. Each department has a separate promotion and tenure committee, and no committee in one department considers promotions in another department. As to her promotion upon retirement claim, it is undenied that

she was not qualified for a regular promotion, due to her lack of a Ph.D. degree in chemistry. Even assuming that Ms. Gilmore was "qualified" for a "courtesy" promotion upon retirement, she has still not made out a prima facie case of sex discrimination, because she has failed to show that the Chemistry Department ever granted a courtesy promotion upon retirement to anyone. That some departments grant "courtesy" promotions to boost a faculty member's base pay for retirement purposes and some departments do not may be a poor employment practice, but there is no showing in this case that sex discrimination was involved.

Furthermore, the court does not find that Ms. Gilmore is equally qualified with Mr. Sanford and Mr. Payne. Mr. Sanford and Mr. Payne both had masters

degrees in their respective fields; both had more experience in academia and at PSU; both taught more lecture (as opposed to laboratory) classes than did Ms. Gilmore, and both were considered excellent teachers by their peers. In addition, Mr. Sanford had a limited record of publication, unlike Ms. Gilmore.

The court finds that the differences in education and experience between Ms. Gilmore and her comparators is a reasonable, non-pretextual basis for Ms. Gilmore's lower salary.

Ms. Gilmore cannot prevail on her individual claim.

BETTY LEONARD

Betty Leonard, an associate professor in the School of Social Work at Portland State University (PSU), who resigned June 30, 1982, filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) on September 4, 1980. Ms. Leonard claims that she was discriminated against because of her sex in that she received less pay than equally qualified males performing substantially the same job. Ms. Leonard received a Right to Sue Letter from the EEOC on November 5, 1980.

SALARY CLAIM

Ms. Leonard has a B.A. degree from Bennington College, Vermont, and an M.A. degree in Social Work from the Minnesota School of Social Work. She worked for 15 years as a social worker, including 12

years as a social worker with the Portland Public Schools, before being hired by PSU in 1968. From 1968 until 1970 she coordinated a state-wide social services training program funded by the Department of Health, Education and Welfare (HEW) of the federal government. She reported to the Division of Continuing Education and to the PSU School of Social Work.

In 1970, the HEW grant ended and for the next ten years (except for one sabbatical leave in 1979) Ms. Leonard was the Coordinator of Continuing Education for Social Work. Her job entailed preparing programs, coordinating and implementing these programs, and securing funding for them. Her students were social service providers working in agencies and board members of social service agencies throughout the State of

Oregon. She was not a teacher, but she recruited and supervised teachers for workshops, seminars, institutes, and conferences. Ms. Leonard did not do research and had no publications, but she prepared grant applications and received grant funds for such programs as Indian Social Work Education and Foster Parent Training Education. She received a total of $1,469,094 in grant training (as opposed to research) funds.

During this time she helped to develop and helped teach at PSU a course called "Women in Middle Years." This was an extension service course which was also an elective course for PSU students. In 1974, Ms. Leonard was promoted to associate professor and in 1977 she was granted indefinite tenure.

Prior to 1975, Ms. Leonard's salary was paid by the Division of Continuing

Education. Programs in the Division of Continuing Education are self-supporting -- i.e., the costs of the classes, including the salaries of teachers and coordinators, are funded by grants or by tuition fees. In 1975 and thereafter Ms. Leonard's salary was paid from the instructional budget of the School of Social Work at PSU even though her work was with the Division of Continuing Education.

In 1980, because of cutbacks in grants and budget reductions required by the Legislative Assembly, the PSU School of Social Work lost certain faculty members. At the same time student enrollment increased and grant training funds were becoming increasingly hard for Ms. Leonard to obtain. Dean Bernard Ross of the PSU School of Social Work decided to reassign Ms. Leonard from the

Division of Continuing Education to the School of Social Work where she was to become a member of the regular undergraduate teaching faculty. Prior to her reassignment she had been on a 12 month salary. When she was reassigned, her salary, like the salaries of all of the regular School of Social Work faculty, was a nine month salary. She suffered a corresponding reduction in pay.

As a result of the change in assignment and reduction in salary, Ms. Leonard filed a grievance with PSU. The Personnel Committee in the School of Social Work reviewed Ms. Leonard's claim. Ms. Leonard claimed that Jack Finley, Lynn Thompson, and Louis Curtis, males in the School of Social Work, were equally qualified males who performed substantially the same job as she performed but received higher salaries.

The Personnel Committee, composed of two men and two women, found that the differences between Ms. Leonard's salary and the three male faculty members' salaries were due to length of service and merit salary increases. The Personnel Committee recommended that Ms. Leonard's salary remain as set. However, she never received that salary. She took leaves of absence without pay during the 1980-1981 and 1981-1982 school years in order to write a book and then resigned effective June 30, 1982.

From 1968 until 1980, Ms. Leonard's salary was determined by the PSU School of Social Work, but that determination was based on comparable salaries within the Division of Continuing Education. She complains generally that her salary during this time was low, but when it is compared with others in Continuing

Education it is above the median. As to Ms. Leonard's specific claim, the court must first determine whether Ms. Leonard's three comparators are equally qualified men who have performed substantially the same job as she, but who had received and were offered in 1980 higher salaries than she had received and was offered upon her reassignment in 1980.

All of the comparators are associate professors with Masters Degrees in social work, the same as Ms. Leonard. Mr. Finley was promoted to associate professor and offered tenure in 1972, two years before Ms. Leonard was promoted and five years before she received tenure. He came to PSU one year before she did. Mr. Finley also had completed considerable course work toward a Ph.D. degree by 1980 and had done a

considerable amount of graduate student teaching. Mr. Thompson came to PSU at the same time as Ms. Leonard and was promoted in 1974, the same year as she was promoted. He became Assistant Dean of the School of Social Work in 1980 and before that taught graduate and undergraduate students. Mr. Curtis came to PSU in 1965 and had taught in both the undergraduate and graduate programs. Neither Ms. Leonard nor any of her comparators had significant publications.

As to whether or not she and her comparators performed substantially the same job, Ms. Leonard testified as follows with regard to a comparison between her job and Mr. Finley's:

> Q (Mr. Willner) All right, how would you compare the responsibilities of your two tasks, your job and his job?
>
> A Well, I -- I would say we had equal but different

responsibilities. His responsibility was to the students, the master's students at the school of social work, to the agencies that he was liaison to, and so was I. (Emphasis added.)

Also, I meant to say that in common we had not only those skills I mentioned previously, but we were advisees -- or advisors to students, to master's level students.

Q You both were?

A We both were. And we both were what they call faculty liaison to community agencies.

Q And how did ----

A We both did that, and we also advised, did advising to master's theses.

Q So how would you contrast the level of responsibility?

A Well, I would say it was about the same. The only -- but different. And the difference was that I see the State as sort of my constituency. I worked with State groups all over the State.

Jack tended to work more

localized, although he was active in ----

Q All right, how would you contrast the efforts that you had to put in with the efforts that he had to put in?

A It's hard to do that. I would say that Jack didn't get into grant writing, which is a special kind of expertise and skill and requires a great deal of effort. But he put a lot of effort into his admissions and to work with students. I think he worked very closely, had a good rapport with students. So I'd say equal but different. (Tr. 5365-5366) (Emphasis added.)

Ms. Leonard testified as follows with regard to a comparison between her job and Mr. Thompson's:

Q [By Mr. Willner] Compare yourself with Mr. Thompson, now, in terms of skill, effort and responsibility?

A Again, I would say equal but very different. Lynn's responsibility was at first for the undergraduate program before it became credited. He guided that program through a very difficult period and helped to see that it was

finally accredited. (Tr. 5367-5368) (Emphasis added.)

He did a lot more teaching than I did, and he did outside training. I know from his vitae that he did a lot of training of community groups. So he was active with community groups. He did a lot of teaching.

Q All right.

A He was a good teacher.

Q Overall, how do you compare the skills and efforts and responsibility of the two of you?

A Well, again, I think I'm going to have to say the same as I said with Mr. Finley. I think that the responsibilities were different but equal.

(Emphasis added.)

Ms. Leonard testified as follows with regard to a comparison between her job and Mr. Curtis':

Q [By Mr. Willner] All right, now, contrast your skills, efforts and responsibilities with Mr. Curtis.

A Lew Curtis had several years ahead of me. He came, I think, about two or three years before I did. He did some teaching in the undergraduate program. He did some teaching in the graduate program. His special area of expertise was in classroom scheduling, which is a very difficult thing to do. And I think the dean relied on him to do that a great deal. That was sort of a quasi-administrative position.

In addition, he had special areas. I believe he was interested in corrections. He came out of that field and that was -- he brought a great deal. And he was interested in the drug scene at the time that that was a problem at --

Q How would you evaluate overall his skills, efforts and responsibilities as against yours?

A Well, I think we had perhaps equal responsibility, but, again, very different.

(Tr. 5369) (Emphasis added).

While Ms. Leonard is arguably equally qualified with her male comparators, the job experiences of Ms. Leonard and her comparators are vastly

different. For ten years Ms. Leonard was involved in arranging for adult and citizen education throughout the State of Oregon. The courses she devised were pragmatic -- how-to-do-it-better for social workers in the field. She did little teaching. She was primarily an educational coordinator with funding responsibilities. Her male comparators were involved in teaching undergraduate and graduate students in a campus setting. They were involved in direct, traditional, learning-for-the-sake-of-learning responsibilities. They had little or no funding responsibilities. The social work courses her comparators taught had a curriculum designed by the School of Social Work faculty. Ms. Leonard either designed the curriculum herself or arranged for a teacher who designed his or her own curriculum. The

criteria against which the performances of Ms. Leonard and her comparators were judged were different. The length of their yearly appointments was different. Most students of continuing education are not members of the academic community but are working in their chosen field. Most graduate and undergraduate students are members of the academic community.

Ms. Leonard makes two claims: first, that she was underpaid as Coordinator of Continuing Education as compared to the pay of faculty in regular academic positions in the School of Social Work; and second, that her proposed salary after her transfer into a regular academic position in the School of Social Work was lower than the pay of Mr. Finley, Mr. Thompson, and Mr. Curtis, equally qualified males.

Her first claim is a comparable

worth claim; her complaint is not that her salary is too low when compared with the pay of others in continuing education, but rather that it is too low when compared with the pay of regular academic faculty in the School of Social Work. Ms. Leonard herself testified to the dissimilarities of her job and the jobs of her regular academic faculty comparators. For the court to find for Ms. Leonard on this claim, the court would have to substitute its judgment for that of the institution as to the relative worth of continuing education positions and regular academic positions. Such a result is foreclosed by this court's Order of August 10, 1984 and the decision in Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984).

As to her second claim, assuming that her job and those of her comparators were substantially equal, the court finds that the lower salary proposed for Ms. Leonard was reasonable in light of the greater experience of her comparators. Her comparators had been teaching undergraduate and graduate students in a regular academic setting during the ten years that Ms. Leonard was acting as Coordinator for Continuing Education. Hence, they had a good deal more experience than Ms. Leonard with respect to the position of teaching as a regular faculty member in the School of Social Work. The court finds that the defendant's explanation for Ms. Leonard's lower salary is reasonable and not pretextual.

Ms. Leonard cannot prevail on her individual claim.

DR. ELAINE SPENCER

Dr. Elaine Spencer, a retired associate professor of chemistry at Portland State University (PSU) claims that she was discriminated against because of her sex in that: (1) her starting salary in 1961 was lower than equally qualified men, and percentage and merit increases in pay over the years caused her to receive a lower salary than equally qualified men per forming substantially the same job; (2) she was not promoted as rapidly as equally qualified men performing substantially the same job; (3) she was evaluated on the basis of research and scholarship (a) while being prevented from working with graduate students, (b) while given heavier than ordinary teaching assignments, and (c) while being denied

research laboratory facilities, whereas equally qualified men performing substantially the same job were not burdened with these research and scholarship handicaps. Dr.Spencer filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) and on August 8, 1980 the EEOC sent Dr. Spencer a Notice of Right to Sue Letter.

CIRCUMSTANCES SURROUNDING

DR. SPENCER'S HIRING

Dr. Spencer was first hired by PSU in 1956 when PSU was still a college and only one year beyond being an education extension center. She was appointed as a temporary instructor in mathematics with some part-time teaching assignments in chemistry. She became a regularly employed instructor in 1957. At this time she had a B.S. degree in chemistry from Linfield College and a M.S. degree

in organic chemistry from Massachusetts Institute of Technology.

During 1959-61 Dr. Spencer worked on her doctorate which she obtained from the University of Oregon (now Oregon Health Sciences University) in 1961. She was then promoted to assistant professor and assigned to teach chemistry at a starting salary of $6,000. At the same time Dr. John Wirtz and Dr. Herman Taylor were hired as assistant professors assigned to teach biology at a starting salary of $6,250. Dr. Spencer contends that she was equally qualified with Dr. Wirtz and Dr. Taylor and performed substantially the same job as they performed and therefore should have received the same starting salary. She claims that she was told by her department chair, Dr.James Ferguson, that since she was a woman with an employed

husband and could not go elsewhere to find a job for more money, he did not need to offer her more money.

Dr.Ferguson was asked if he recalled making that statement to Dr.Spencer. He replied:

> "No. Well, the feeling was that she did have a husband, Carl, who was working at the -- I forget the name of the company but it was, we felt, a good job, and with our limited funds, $6000 was all that we felt could be offered her, although, that really went through Dean Peterson and the final amount of money was not in my responsibility. It was his matter of discussing the amount of money."

Def. Ex. 8102, Statement of James Ferguson, p. 8.

Undoubtedly, Dr. Ferguson made the statement about which Dr. Spencer complains. The problem is that in 1961 sex discrimination was not unlawful. Dr.Spencer claims that because salary

increases over the years have been based on a percentage of existing salaries, the discriminatory beginning salary that she received has caused her to receive a lower salary than equally qualified men performing substantially the same job during a time period when sex discrimination is unlawful.

First, despite the discriminatory overtones of Dr. Ferguson's statement, the $250 per year differential between the starting salaries of Dr.Spencer and Drs. Wirtz and Taylor was justified on the basis of legitimate job-related factors. For example, Dr. Taylor obtained his Ph.D. degree two years before Dr. Spencer obtained her Ph.D. degree, had served as a post-doctoral fellow for two years, and had seven publications in refereed[1] journals and three research projects in preparation at

the time of his hire, considerably more scholarly work than Dr. Spencer. Dr. John Wirtz obtained his Ph.D. in 1961, the same year as Dr. Spencer, but he had been an instructor for two years longer than she had been and also had more research productivity than Dr. Spencer.

Dr. Spencer here claims that chemists, such as she, are generally paid more than biologists such as Drs. Taylor and Wirtz. However, at PSU in 1961 at least two full professors who taught biology were paid substantially more than two full professors who taught chemistry.

Dr. Spencer next claims that Dr. Ferguson told her he had to give her some merit pay in 1962-63 because her work had been meritorious, but that he would not give her as much as allotted because her husband was employed.

However, Dr.Spencer's testimony on cross-examination refutes this claim.

> Q (By Ms. Rodgers) In 1962 you said that you received merit money. Do you know whether there was any range of merit money available for individuals or whether it was one amount?
>
> A I don't understand that question.
>
> Q How was the merit money calculated in 1962?
>
> A I did not know.
>
> Q Do you know anybody who received more than the amount of money that you received?
>
> A Not in 1962.
>
> Q You received the maximum?
>
> A I do not know whether I received the maximum or not.
>
> Q But you don't know anybody who received any more?
>
> A Nor anyone who received any less.
>
> Q You have to give a verbal answer.

A I really do not know what made up the decision to award me merit money at that time or how much.

Q But you don't know anybody who received more money than you did?

You have been shaking your head. You have to give a verbal answer for it to appear on the record.

A Yes. Not in 1962, the first raise that I received. Tr. 5242 - 5243.

In addition to the 1962 merit increase, Dr.Spencer received another equity increase in the early '70's and in 1978 when equity pay increases were given to faculty who had been hired when salaries were much lower and who were therefore earning much less than newer faculty members. From 1961-1982, Dr.Spencer received a 309% increase in her salary -- the highest percentage increase for anyone in the Chemistry Department at PSU.

Dr. Spencer complains that she has received a lower salary than four equally qualified males performing substantially the same job: Dr. Levenson, Dr. Brown, Dr. Roberti, and Dr. Mickleson. Drs. Levenson, Brown, and Roberti are full professors. Dr. Spencer's own testimony indicates that Drs. Levenson and Brown have done more scholarly research than she has and therefore are not equally qualified males.

> A Well, of course at the present time Dr. Levinson has had the opportunity to do quite a lot of research. And he has continued his teaching assignment at about the same level as my own. And he has been on many university committees.
>
> * * *
>
> Q [By Mr. Willner] All right. Compare yourself with Dr.Bruce Brown.

> A Dr. Brown has also had much more opportunity to do research and has been appointed to administrative positions through the years. (Tr. 5213).

Dr.Roberti came to Portland State in 1952 and was promoted to full professor in 1967. His higher salary can be attributed to his longer years of service and early promotions based on research and publication.

Dr. Spencer's career most closely parallels that of Dr.Mickleson. Both are associate professors; both are good/average teachers; and neither has published to any extent. Dr.Mickleson did receive a grant from the Petroleum Research Foundation in 1962 and has traveled to Denmark as part of the research fellowship. Also, Dr.Mickleson began teaching at PSU in 1955, the same year that he received his Ph.D. His

career spans more years than that of Dr.Spencer, and he has had his Ph.D. for six years longer than she has. Even with these differences, in 1979, Dr.Spencer made $21,112, and Dr.Mickleson made $21,766. The court cannot say that Dr.Spencer has received an unjustifiably lower salary than Dr.Mickleson.

RESEARCH AND PROMOTION

Dr. Spencer claims that she has been unable to conduct the research necessary to meet the scholarly activity criterion for becoming a full professor because (1) she was locked out of her laboratory; (2) she was denied access to graduate student assistants used in conducting research; and (3) she was given such a heavy teaching load that she did not have time to conduct research and prepare publications based upon that research. She also claims that these reasons

delayed her promotion to associate professor.

Currently at PSU, teaching, research and publication, and service to the institution and the community are all considered in promotion decisions, and in particular the promotion to full professor. In order to understand the role of research at PSU it is necessary to outline the history of PSU. Before 1955 PSU was an education extension center. It became a college in 1955. By 1960 it had only a general science department which offered courses for non-science majors in such subjects as chemistry and biology. In the mid-1960's PSU began to add graduate programs in the general science area. In 1967, the transition from a college to a university began. In 1969, Portland State College became Portland State

University and Ph.D. programs were authorized. Faculty such as Dr.Spencer, who were hired during the early years, were not terminated, but new faculty with credentials for working with Ph.D. candidates were hired. As of 1970, Dr.Spencer had not published any substantial work except a summary of her Ph.D. thesis which appeared in a non-refereed journal. She was, however, a competent teacher, and thus she was assigned a heavier teaching load than she might have had had she been a productive scholar. Dr.Spencer stated that this decision "made sense."

Dr.Spencer claims that she was essentially prevented from doing scholarship. However, Dr.Spencer did not actively and consistently seek out funding for research projects and did not write grant proposals to national

agencies for laboratory equipment. Until 1967, the Chemistry Department was in a building which was a condemned schoolhouse. Dr.Spencer had approximately the same research facilities as anyone else had, which were inadequate. In 1967, the Chemistry Department moved to Science Building I, which had improved laboratory space including research laboratories adjacent to each faculty member's office. Dr. Spencer had at all times until her retirement in 1984, the use of a small personal laboratory and the use of the main teaching biochemistry laboratory when it was not being used for teaching. At no time was she locked out of her research laboratory.

Men and women in the department were treated equally. For example, Dr. Joanne Loehr, a woman, had a relatively light

teaching load because she was extensively involved in research. Drs. Mickleson, Roberti, and Silverman, men, had relatively heavy teaching loads because they did little research. While Dr. Spencer's laboratory space was smaller than Dr. Kilgore's, a man, Dr. Kilgore's lab space was smaller than that of Dr.Loehr, a woman. The court concludes that Dr.Spencer was not unfairly treated as far as the use of the laboratories was concerned.

Dr.Spencer claims that if she had had access to graduate students she would have been able to perform research and therefore become a full professor. The fact is that Dr.Spencer was not a good supervisor for graduate students. She failed to supervise properly the work of Ellen Hannen, Mary Ellen Tracy, and David Swehla. Her name was therefore

removed from the list of graduate student research advisers. Furthermore, Dr. Spencer was unwilling to work summers during a time when graduate students were working. Also, graduate students are not necessarily a part of faculty research. Undoubtedly, they are of valuable assistance, but much faculty research is done alone or with the aid of undergraduate students.

PSU promotion and tenure guidelines prior to 1977-78 required demonstration of excellence in teaching, research, or service. But in 1977-78 the guidelines for promotion to full professor were changed to require excellence in all three areas. Dr.Spencer was promoted from assistant professor to associate professor for the 1974-75 academic year. This promotion was based on her service record and on her work with Dr. Mickleson

in preparing their general chemistry textbook, which was never published. Her promotion to full professor was denied because of lack of scholarship. Both the delay in her promotion to associate professor and the denial of her promotion to full professor are justified by her lack of scholarly activities and her good/average teaching and service records. The court concludes that she was never denied a promotion because of her sex.

Dr. Spencer cannot prevail on her individual claim.

Dr. Spencer Footnote

1. There are two kinds of academic journals, refereed and non-refereed. Refereed journals publish only those articles considered sufficiently original or significant by a panel of leading academics in the field as to merit publication. In contrast, articles published in non-refereed journals do not have to pass this kind of scrutiny. Publication of an article in a refereed journal is a substantially more significant accomplishment than is publication in a non-refereed journal.

DR. BARBARA STEWART

Dr. Barbara Stewart, an associate professor in the School of Nursing at the Oregon Health Sciences University (OHSU), claims that she was discriminated against because of her sex while she was an associate professor at Portland State University (PSU) working in the Institute on Aging (IOA). She claims that she was discriminatorily assigned to part-time work from November, 1979 through June, 1980. Dr. Stewart intervened in this action as a named plaintiff without filing a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC).

SEX DISCRIMINATION AND THE INSTITUTE ON AGING AT PSU

Dr. Stewart received her degrees from Purdue University: a B.A. in 1966;

an M.S. in 1968; and a Ph.D. in 1969. Her areas of study were psychology, mathematics, clinical psychology, and applied statistics. During this time she served as a teaching assistant and an instructor in the Department of Psychology at Purdue University.

From September, 1969 through June, 1970, Dr. Stewart was an assistant professor at PSU. From August, 1970 through August, 1976, she taught at Oklahoma State University where she was promoted to associate professor and granted indefinite tenure.

In the fall of 1976, Dr. Stewart returned to PSU as an associate professor. From then until 1981, when she became employed at OHSU, she served at various times in the Department of Psychology, the School of Urban Affairs, and the Institute on Aging. She was

evaluated for merit pay increases by the department or institute which paid the greater portion of her salary for any given year. Her salary for her work in the Department of Psychology and in the School of Urban Affairs came from state funds (denominated "hard" money), and her salary for her work in the IOA came from federal grant funds (denominated "soft" money). Except for certain summer terms, she was employed full time at PSU.

In order to understand Dr. Stewart's claim of sex discrimination, it is necessary to understand the relationship of the IOA to PSU and how its activities are funded. The IOA is not a department at PSU; it is a research unit of the School of Urban Affairs. It had budgeted to it by PSU only $60,000 to $65,000 for the budgetary period relevant to this case. All other funds

had to be obtained through research grants. IOA offers no academic courses; therefore, it is composed primarily of research assistants and research associates.

In 1979, the IOA had three tenure-track or tenured positions -- i.e., positions for which funds are committed yearly. These positions were held by Dr. Douglas Montgomery, the former acting Director of IOA, and Dr. Leonard Cain, one of the "old-timers" at PSU and the IOA. Dr. Richard Schulz, the new Director of the IOA, who came in January, 1979, was on tenure track and therefore the funds for his salary were also committed annually.

Between 1976 and 1979 almost all of the IOA's grant funds came from the Administration on Aging, an agency of the United States Government. However, by

1979, the Administration on Aging was in decline and was being supplanted by the National Institute on Aging, another federal agency with a different focus. During the summer of 1979 most of the IOA grants obtained from the Administration on Aging expired, and although grant proposals for between $200,000 and $500,000 in grant funds were submitted to various agencies, only one grant proposal for $30,000 was funded. The IOA faced immediate and drastic staff reductions. It is out of this funding calamity that Dr. Stewart's sex discrimination claim arises.

When Dr. Schulz learned that the $30,000 was the only grant forthcoming, he met with the Dean of the School of Urban Affairs, Nohad Toulon, and with PSU President Joseph Blumel in an attempt to obtain $90,000 in University

money in order to maintain existing IOA staff salaries until the next funding cycle in the spring of 1980. President Blumel had only $50,000 of discretionary funds available for use during the 1979-1980 school year for any and all contingencies that might arise at PSU. Even under these circumstances, President Blumel gave $30,000 to Dr. Schulz for the IOA staff salaries. No constraints on the use or distribution of these funds were imposed, but the IOA was still $60,000 short of funds necessary for full staffing.

Dr. Schulz then submitted for approval to Dean Toulon and to Dr. Margaret Dobson, Vice President for Academic Affairs, a plan for IOA staff salary reductions. In preparing his plan for staff salary reductions, Dr. Schulz did not consult with IOA staff members[1],

although he did consult with Dean Toulon. His plan was approved by Dean Toulon and Dr. Dobson.

On November 7, 1979, Dean Schulz presented his plan for staff salary reductions to the IOA staff. The plan, coincidentally according to Dr. Schulz, provided for all of the men to receive full-time salaries and for all of the women to receive part-time salaries[1]. The names of the men and women identified in Dr. Stewart's testimony and the percentages of planned salaries for each for 1979-80 are listed as follows:[2]

MEN

Dr. Richard Schulz 100% (1.0 FTE)
Dr. Douglas Montgomery 100% (1.0 FTE)
Dr. Leonard Cain 100% (1.0 FTE)
Michael DeShane 100% (1.0 FTE)
Fred Keast 100% (1.0 FTE)
Gary Holznagle 100% (1.0 FTE)

WOMEN

Dr. Barbara Stewart 60% (.6 FTE)
Lois Copperman 50% (.5 FTE)

Margaret Neal 80% (.8 FTE)
Diana White 80% (.8 FTE)
Annie Wilkinson less than 50%(.5FTE)
Marlene Peterson " " " "
Ellen Jean 80% (.8 FTE)

See Def. Ex. 8149, Statement of Richard Schultz, p. 52 and Tr. - 6826.

Dr. Stewart and Dr. Montgomery[3] testified that they as well as others were surprised, shocked, angered, and embarrassed at the meeting, and that they stated their grievances to Dr. Schulz when the plan was announced. Dr. Schulz testified that the meeting was a short, twenty minute affair, and that he was unaware of Dr. Stewart's complaint until he received an affidavit from Dr. Stewart a year-and-a-half later, when she became a named plaintiff in this case. In any event, the plan was not changed, and no grievances were filed with PSU or the EEOC.

PURPOSE OF THE PLAN

No one disputes that an immediate staff salary reduction was necessary. There were insufficient funds to pay everyone the way he or she had anticipated being paid. No one disputes that the plan devised by Dr. Schulz had been approved by the Dean of the School of Urban Affairs and by the Vice President for Academic Affairs, who was a woman. Dr. Stewart contends, however, that Dr. Schulz's motives in drafting the plan were discriminatory. She testified as follows:

> Q (Mr. Willner) Did you ask Dr. Schulz for any explanation?
>
> A Yes, I did. I said that in light of the fact that I was head of research operations and that I felt that I was a rather central person in the institute on aging, I said I didn't understand why -- why my funding was only going to be an additional 24 percent, total .60 FTE and that Michael DeShane and Fred Keast and Gary

Holtznagle were at 1.0. It didn't make any sense to me. And the first response that Mr. Schulz told me was that the university had agreed to pay people what they typically had worked for in the past. And my reaction to that was well, you know -- and that people who had not worked full time in the past would not be paid full time now. And my response was, well, I have worked less than full time in the summers but always during the academic year I have worked full time. And then an additional reason was given and they said well, people ----

Q You said "they said." Who said?

A Richard Schulz said.

Q All right.

A That they were trying to determine -- I want to remember the exact type of phrasing. It's probably not verbatim, but pretty close. They wanted to pay people a minimum of what was needed to keep them. And so they decided, you know, that they would give that funding on what they thought was the minimum to keep people at the Institute and that they would be willing to work, and that they took -- they also took

into consideration family obligations and whether or not a person was single and suggested that kind of their financial needs would be taken into account in making those decisions.

Q Did you make any statement about what Dr. Schulz had said about -- what you just testified to?

A Well, I indicated that I thought that it sounded as -- because all of the men were being paid full time and none of the women were, that it certainly sounded like some kind of sex discrimination. And I'm not sure if I remember the exact sequence of everybody speaking.

And Leonard Cain, I think he piped in before that and he said that he was embarrassed that he had not questioned the decision-making, the rationale for the decision-making and also thought that some of the decisions did not sound quite right.

And I guess what surprised me is then nobody had any other explanations. It was just real silent. And of course in this room here was Michael DeShane who was going to get full time and Gary Holtznagle who was

going to get full time and Doug Montgomery and Leonard Cain and Richard Schulz were already regular faculty members and receiving full time pay. And Dianna White, who was a graduate student at that time, was going to receive 80 percent. And I was just surprised. I was really stunned. It was just like silence. Nobody had any other explanations for me.

Q Did you say anything about two women researchers?

A Yes, I did point up and I said that one of the things that especially concerned me was that that fall we had received one federally funded grant that had been written by Margaret Neal and Dianna White. Though that grant paid for half of their salary and that what the institute was saying in effect was that they would give those two women an additional 30 percent. And I said that it's interesting that the only two people who brought in grant funds were not even being funded a hundred percent and I found that troublesome. (Tr. 6828 - 6831)

Dr. Schulz denied that he took into consideration family obligations or the

marital status or prior workloads of IOA staff members in determining how to make salary cuts. He claims instead that the plan was designed to retain those people who were the best and most prolific grant writers so that grant proposals could be prepared and grant funds received during the next funding cycle. Specifically, Dr. Schulz testified as follows:

> Q (Ms. Rogers) What decision, then, was ultimately reached as to how the money would be distributed? Who was to receive it?
>
> A The decision was based on mine and in part the dean's best estimation of how to invest those monies in a way that would likely give us the largest return in the next funding cycle. That involved identifying those individuals who we felt critical to producing funds the next time around. (Def. Ex. 8149 p. 28)

In order to determine whether Dr. Stewart and the other women in the IOA

were discriminated against because of their sex, the court must determine whether the evidence supports Dr. Stewart's claim of discrimination or Dr. Schulz' claim that he made salary cuts to fulfill his stated goal. The court will begin with an analysis of each of the men and each of the women about whom Dr. Stewart testified.

DR. RICHARD SCHULZ

Dr. Schulz came to PSU in January, 1979, as the Director of the IOA on a tenure track position with a three year contract. The moneys allocated for his salary were committed funds from the IOA - i.e., hard money. His salary was "guaranteed" insofar as any salary can be guaranteed. It would have been unreasonable - even ridiculous - to expect him to reduce his own salary in

the staff salary reduction plan.

DR. DOUGLAS MONTGOMERY

Dr. Montgomery was the former acting Director of the IOA. Dr. Montgomery was also on a tenure track position. The funds for his salary were committed funds from the IOA - again "guaranteed" insofar as any salary can be guaranteed. Dr. Schulz had no authority to reduce Dr. Montgomery's salary in the staff salary reduction plan. In other words, he could not have reduced Dr. Montgomery's salary had he so desired.

DR. LEONARD CAIN

Dr. Cain was a tenured faculty member from the Department of Sociology who performed certain duties in the IOA. The funds for his salary were committed funds from the Department of Sociology. Dr. Schulz had no authority to reduce Dr.

Cain's salary had he so desired.

GARY HOLZNAGLE

Mr. Holznagle was the IOA bookkeeper and supervisor of support staff. His role in the IOA was different from the other staff members. He wrote and supervised grant budgets, making sure that the budget portion of grant proposals met federal and state regulations. He also supervised the budgetary aspects of grant funds after they were received - again making sure that principal investigators met federal and state regulations. Mr. Holznagle was also in charge of preparing closing reports on grants, four of which had to be prepared in November, 1979. Since grant proposals which included budget proposals had to be prepared for the spring, 1980 funding cycle, and since four closing reports with budgetary

aspects had to be prepared for grant projects that had been concluded during the summer of 1979, there was nothing discriminatory in Dr. Schulz' decision to retain Mr. Holznagle at full salary in November, 1979.

LOIS COPPERMAN

In her direct testimony Dr. Stewart did no more than mention Ms. Copperman as someone who would be funded at less than 1.0 FTE. In her cross-examination Dr. Stewart testified as follows: . . .

> Lois Copperman typically worked less than 1.0, I believe at her request.

(Tr. 6855).

Dr. Schulz testified that Ms. Copperman was funded at .5 FTE at her request. There was nothing discriminatory in Dr. Schulz' decision to retain Ms. Copperman at .5 FTE in

November, 1979.

MARGARET NEAL and DIANA WHITE[4]

Ms. Neal and Ms. White had received a grant for $30,000, the only grant received for the fall of 1979. This was a small grant and the only one they had ever received. Ms. White was completing her Master's Degree in November, 1979 and Ms. Neal was a graduate student. In her cross-examination Dr. Stewart testified as follows:

> Q (By Ms. Rogers) Neal and White ----
>
> A Yes.
>
> * * *
>
> Q Were those two people graduate students at that time?
>
> A Dianna White was finishing her Master's thesis the fall of 1979, which she did in November. And then she was not -- no longer a student. In other words, she was going to have what one would refer to

as a terminal Master's Degree. She was not planning to go on for her doctorate at that time.

I'm not sure at that time whether or not Margaret Neal was a student. I know that she had already received her Master's Degree. And sometimes students will go for -- will finish a degree and then not re-enroll for a period of time during which they will work as a research assistant. And then sometimes they will go back to school. So I don't know exactly if that was a period that she was enrolled as a student or not. She may very well have been.

Q Were any of them subsequently enrolled in Ph.D. programs?

A Margaret Neal was, yes.

Q Do you have any idea whether she was enrolled in the Ph.D. program in the fall of '79?

A I am not sure.

Q In fact, their history with Portland State and the Institute on Aging had always been as kind of a fill-in as they were needed on particular grants, with the exception of the one grant that they had written, the small one?

A I guess I react to the word fill-in in a not positive way, because you didn't ask it in the same way for Fred Keast. They were involved in working on important projects, as he had been.

Q But by invitation of the principal investigator or as they were needed by a principal investigator to do a piece of a project?

A They were usually hired for the entirety of a project, assuming the funds allowed that, to carry out a portion of that project as a research assistant.

Q But they had not been principal investigators until they had actually received this ----

A Correct, correct. (Tr. 6856 - 6858)

Dr. Schulz testified that Ms. Neal and Ms. White were not in grant funding or research leadership roles but that they played very important supportive roles. There was nothing discriminatory in Dr. Schulz' decision to retain Ms.

Neal and Ms. White at .8 FTE in November, 1979.

ANNIE WILKINSON and

MARLENE PETERSON

On direct examination Dr. Stewart testified as follows about Ms. Wilkinson and Ms. Peterson:

> It was also indicated that Ann Wilkinson would receive some amount less than 1.0 FTE and not for the entire year, so that was not specified completely. And that Marlene Peterson would receive .50 FTE or less for two or three months in the fall and 0 FTE for the rest of the year.

(Tr. - 6826).

Dr. Stewart was asked no questions about Ms. Wilkinson and Ms. Peterson on cross examination; however, Dr. Schulz testified as follows:

> Q (by Ms. Rogers) Ann Wilkinson?
>
> A Ann Wilkinson. Ann Wilkinson also was a student and would fall generally into

> the same category that Margaret Neal and Diana White. She had up to the point not demonstrated any initiative on her own with respect to money generation. And I had no expectation that she could in the future.
>
> Q Marlene Peterson?
>
> A Marlene Peterson was also a graduate student at the time. And again, she had played important supportive roles but was not an initiator of ideas or grant proposals that appeared to be fundable. (Def. Ex. 8149, P. 55)

There was nothing discriminatory in Dr. Schulz' decision to retain Ms. Wilkinson and Ms. Peterson at less than full salary in November, 1979.

ELLEN JEAN

Both Dr. Stewart (on cross examination) and Dr. Schulz testified that Ms. Jean had requested maternity leave and a half-time appointment. As of November 7, 1979, she had not requested an increase in her workload.

There was nothing discriminatory in Dr. Schulz' decision to retain Ms. Jean at less than full salary in November, 1979.

There is no evidence in the record to support Dr. Stewart's claim that "women" in the IOA were discriminated against by Dr. Schulz in November, 1979.

The court will now examine Dr. Stewart's individual claim as it relates to Michael DeShane and Fred Keast. The issue is: was Dr. Stewart's salary reduced because she was a woman and were Mr. DeShane's and Mr. Keast's salaries funded at 1.0 FTE because they were men or were the salary decisions regarding Dr. Stewart, Mr. DeShane and Mr. Keast the natural result of a stated and non-discriminatory goal -- that is, to retain those people who were the best and most prolific grant writers so that grant

proposals could be prepared and grant funds received during the spring 1980 funding cycle?

DR. STEWART

From 1976 until she left in the fall of 1981, Dr. Stewart served on a part-time basis as a methodologist in the IOA. The salary for her services in the IOA was paid with grant funds -- soft money. She also served as a regular teaching faculty on a part-time basis in either the Department of Psychology or the School of Urban Affairs. Her salary for her services in the Department of Psychology and the School of Urban Affairs was paid from University funds -- hard money.

Dr. Stewart's duties in the IOA were primarily as a methodologist. She had no subject matter specialty relating to aging such as pensions, housing, or

social security, but she was used as a consultant and a statistician by the specialists to analyz data, to gather data, to assist with experimental measurement, etc. She was basically a part-time "support" person to all of the primary investigators[5] and she worked with graduate students. In her role as consulting methodologist Dr. Stewart performed well.

Dr. Stewart had also served in an administrative role in the IOA as research coordinator for all of the grants. As research coordinator she monitored the progress of each grant, reported to the Director of the IOA about the progress of each grant, and worked to insure that grants were completed on time. Her performance in her administrative role was not satisfactory. For example, a housing grant for which

Dr. Stewart was the primary methodological consultant and for which she had administrative duties had inordinate problems and delays. A client-relations project for which Dr. Stewart served as the primary administrative overseer was several years behind schedule.[6]

In summary, then, at the time Dr. Schulz made his decisions regarding staff salary reductions he considered Dr. Stewart to be a good and willing consultant and an excellent teacher in the School of Urban Affairs, but he did not consider her to be a grant proposal writer, since she had never obtained any grant funds, and he did not consider her to be a good administrative coordinator. Furthermore, Dr. Schulz was himself a methodologist and his expertise and that of Dr. Stewart overlapped to some

extent. If her hours were to be reduced, he would be able to do some of her work himself.

On the other hand, Mr. DeShane was a proven grant writer. In 1979 he was the primary investigator of a $200,000 Attitudes on the Elderly grant. Mr. Keast was a fast and prolific writer -- the major writer of one of the grants that expired in 1979 --and his primary field of interest was in an area considered by Dr. Schulz to be ripe for future funding. Both had full appointments in the IOA and did not have responsibilities to the School of Urban Affairs, as did Dr. Stewart. Neither Mr. DeShane nor Mr. Keast was known for excellence in teaching as was Dr. Stewart; neither Mr. DeShane nor Mr. Keast was known as a good consultant as was Dr. Stewart; neither Mr. DeShane nor

Mr. Keast had a Ph.D. degree as had Dr. Stewart. But excellence in teaching, excellence in consulting, and Ph.D. degrees were not what was needed at that time. Grant writing skills were.[7]

The court concludes that in November, 1979, when Dr. Schulz faced a financial crisis that came close to "wiping out" the entire IOA[8], Dr. Schulz' explanation for retaining Mr. DeShane and Mr. Keast at full salary and reducing Dr. Stewart's salary is a reasonable explanation and not a pretext for discrimination.

Dr. Stewart cannot prevail on her individual claim.

DR. STEWART FOOTNOTES

1. Dr. Schulz was under no obligation to consult with IOA staff members regarding his plan for staff salary reductions since the IOA was not a department with a traditional, collegially-oriented, decision making process. Had he done so, however, he might have avoided some of the surprise, shock, anger, and embarrassment that was expressed when the plan was revealed to the IOA staff on November 7, 1979.

2. This list does not include support staff such as secretaries or others who played relatively minor roles in the IOA.

3. The relationship between Dr. Schulz and Dr. Montgomery was admittedly hostile, even combative. Dr. Schulz was responsible for Dr. Montgomery's failure to obtain tenure and the termination of his employment at PSU. Dr. Montgomery is a biased witness. The court discounts his testimony.

4. Shortly after the November 7, 1979 meeting, additional funding was found for Ms. Neal and Ms. White.

5. Dr. Stewart was the primary investigator for only one grant which was obtained in 1980.

6. Dr. Schulz testified that while it is not uncommon for a grant project to be late, it is ordinarily unacceptable for a project to be more than six or nine

months late. Lateness in completing grant projects jeopardizes the ability of an institution to obtain other grants. The project for which Dr. Stewart became primary investigator in 1980 was 18 months late in completion and was then completed only after the IOA had expended some $10,000 of its own money beyond the grant funds.

7. In the spring, 1980 funding cycles writing skills "paid off." Mr. DeShane, Mr. Keast, Ms. Copperman, Dr. Schulz, and Dr. Stewart all received funding for grant proposals they wrote.

8. Dr. Stewart's own testimony indicates the magnitude of the financial crisis. She testified as follows:

> Q (By Ms. Rogers) And what had happened in November of 1979 was simply that of those two to three hundred thousand to half a million dollars worth of grants, only 30,000 were funded?
>
> A Yes, that's true.
>
> Q And that decision came to the institute sometime in October, November of 1979?
>
> A Yes, it did.
>
> Q And that was a tremendous drop in funding for the institute, wasn't it?
>
> A Yes, it was.

Q Almost wiped it out, wouldn't you say that's correct?

A It would probably come close to that, yes.

Q The next funding cycle then would have been in the spring of 1980, wouldn't it?

A Yes, it would have been.

Q And before that cycle could occur, for the interim there was no grant money coming in after November of 1979?

A No, there would not have been. Not that I know of.

(Tr. - 6836).

MICHELE WOLLERT

Michele Wollert, a resident of Saskatoon, Saskatchewan, Canada, claims that she was discriminated against because of her sex while she served as a faculty member in the Theater Department of the College of Arts and Letters at Portland State University (PSU) from 1976 to 1983. Specifically, she claims that because of her sex (1) she was not promoted to assistant professor in 1977; (2) she was not placed on tenure track until 1979; (3) she was not promoted to associate professor until 1983, while a male comparator, who was hired as an assistant professor in 1977, was promoted to associate professor in 1981; and (4) she was paid less than an equally qualified man who performed substantially the same job as she performed from 1976-82. Ms. Wollert did

not file a charge of discrimination with the Equal Employment Opportunity Commission. She did not file any internal grievances with PSU.

Ms. Wollert received a B.S. degree in speech and theater in 1972 and an M.A. degree in theater and drama in 1976, both from Indiana University. Prior to coming to PSU in 1976, she served as a faculty assistant in costuming, Indiana University, 1974-76; scenic artist, Kentucky Opera Association, Louisville, Kentucky, 1972-73; instructor of stage craft/scene design, Indiana University High School Drama Institute, summer, 1972; and costume/scenic designer, Steamboat Cabin Theater, Jeffersonville, Indiana, 1972.

About 1976 when she received her M.A. degree, Ms. Wollert noticed an advertisement placed by PSU in the

American Theater Association Placement Bulletin seeking a person for the position of costume designer/scene designer, an academic position at the rank of assistant professor. She applied for the job. PSU had placed the advertisement because it anticipated that the person who was the scenery designer was going to be terminated. However, that person was not given timely notice of his termination, and therefore he was allowed to remain until the spring of 1977. As a result, PSU did not respond to Ms. Wollert's application.

Sometime later in 1976, Ms. Wollert and her husband moved to Portland, Oregon, where he had an internship in medical psychology at the Oregon Health Sciences University. In the fall of 1976, a person holding the position of Seamstress II, a classified position,

unexpectedly resigned from PSU. This was a position requiring only a high school diploma. Ms. Wollert was invited to accept that position, and she did so. Her job was to teach students how to design and construct costumes for PSU theatrical productions; to maintain the costume shop; to hire support personnel; and to buy supplies and equipment. As a classified employee she had no teaching or advising duties, and she was not required to serve on faculty committees, although she voluntarily attended faculty meetings and assisted students when ever she felt it necessary to do so.

She served in the position of Seamstress II for seven months. Thereafter, Ms. Wollert and the chairman of her department persuaded the Oregon State Employees' Association and PSU

administrators to change the position of Seamstress II, a classified position, to an academic position. Final approval of the reclassification came shortly after September 7, 1977. She was given the rank of instructor for the 1977-78 academic year.

Ms. Wollert first claims she was discriminated against because she did not receive the rank of assistant professor rather than the rank of instructor when the classified position became an academic position. In response to this charge, Dr. John Trudeau, who was then the Dean of the College of Arts and Letters, testified that there were no new monies available in September, 1977, to fund the position as assistant professor, because the position had been budgeted as a classified position. In fact, in order to fund the position at

the instructor level, he had to take money from the School of Arts and Sciences Student Fund and from the Service and Supply budget and add these monies to the Civil Service funds Ms. Wollert would have received as a classified employee. Thereafter, Dr. Trudeau budgeted for Ms. Wollert's position as assistant professor for the 1978-79 academic year. Dr. Trudeau testified that he could not "promote" Ms. Wollert to the rank of assistant professor and then pay her a salary appropriate for the rank of instructor. Dr. Trudeau's explanation is a reasonable one. The court concludes that sex discrimination was not the reason Ms. Wollert received the rank of instructor instead of the rank of assistant professor in September, 1977.

In the summer of 1978, the position

Ms. Wollert held as instructor was upgraded to the position of assistant professor of costume design. Funds had been budgeted for this position. Ms. Wollert was required to apply for and compete with other applicants for this position because of PSU affirmative action guidelines. A national search was conducted. After a national search, Ms. Wollert was selected for the position of assistant professor of costume design for the 1978-79 academic year.

Ms. Wollert's next claim of sex discrimination arises from being hired as an assistant professor of costume design on a fixed-term appointment, rather than on a tenure track appointment. The facts are undisputed that she received two offers of appointment: one dated July 3, 1978, which listed the position as "tenure

track"; and another dated July 7, 1978, which listed the position as "fixed-term." Ms. Wollert claims that the position was changed from tenure track to fixed-term because she, as a woman, was the successful applicant. In her direct testimony, however, she offers no reason why she signed and accepted the offer of appointment dated July 7, 1978, at fixed term rather than the offer of appointment dated July 3, 1978, at tenure track.

Jack Featheringill, the then-department chair, testified as follows:

> Q [By Ms. Rodgers] Were you able, as department head, to subsequently have the position elevated to assistant professor rank?
>
> A Yes, I believe so. I don't recall the specific paper work on it, but I believe we then were able to get it changed to assistant professor tenure track position and do a formal search in which Michele could

be considered as one of the applicants.

Q I think you just stated, Professor Featheringill, that that position was a tenure track position. Was it tenure track that year or was it later converted to tenure track?

A That's right. It was the first year assistant professors were unable to get the tenure track. I think we did not get that till a later year.

Q Okay. Was that your first search as department head, the first search that you had conducted?

A Yes.

Q Do you recall sending a letter of offer to Michele Wollert, who was a successful candidate of that search? Let me show you ... the letters of July 3rd and letters of July 7.

A Yes. Looking at both of those letters, I don't actually recall, either, specifically. Except certainly when someone's appointed, you send out a letter.

Q Did you originally author the body of those letters?

A No. These letters are both prescribed formats with information of what was to be stated, what statement must be made about administrative rules and so forth. And the type of letter, at least by me as a chairperson at that time, was being done by models set down by the dean or in file in our office.

A Okay. It's not an original creative effort?

A No.

Q Do you recall doing two letters?

A No. This is strange, I have no recall of it. I see the first one offers the position as tenure related and the second one specifically states that it's a fixed term appointment which will not accrue in time towards tenure or sabbatical. It looks as though a wrong model was used for the letter. I do not recall the sequence of events surrounding the change from one letter to the other. I don't know, for instance, if I provided Michele with the first letter, or just sent it to the dean for approval and there it got rejected and I was told I couldn't use another model before contacting

Michele. I really have no recall of that switch of models.

. . .

Q That's all right. We're simply looking for an honest recollection. Do you recall whether the position was advertised as a tenure track position?

A Yes, it was. That would have been the job advertisement to begin fall '78?

A Correct.

Q Then let me ask you if you have any recollection of withdrawing the July 3, 1978, offer of a tenure track position and replacing it with an offer of a fixed term position because the successful applicant was a woman?

A No.

Q Then, do you have any recollection? Your answer is you don't have any recollection?

A No, I have no recollection withdrawing it because she's a woman.

Q Let me ask you if you would have withdrawn it because this

successful applicant was a woman.

A Absolutely not.

(Statement of Jack Featheringill, Sept.6, 1984, pp. 38-41).

Dean Trudeau also testified regarding the change in Ms. Wollert's position from tenure track to fixed-term:

Q [By Ms. Rodgers] Do you recall whether that position was fixed term or tenure track for that first year?

A It was advertised as an annual tenure track position but changed to fixed term due to an unforeseen hiring freeze.

Q Do you recall when it was authorized to be filled on a tenure track?

A It was recommended in early '79. February I believe of '79 and approved, but would not take effect until September of that year. So it would be the academic year '79-'80 that it would become effective.

Q Since there had been a national search conducted the previous year, was a national search required for con version

of the position to tenure track?

A No, no, that wouldn't affect it.

Q When the position was converted to tenure track, do you recall the number of years credit towards tenure that Michele Wollert was given?

A She was allowed one year (78-79) as prior service.

(Statement of Dean Trudeau, Aug. 27, 1984, pp. 41, 42).

Ms. Wollert served as an assistant professor, fixed-term, during the 1978-79 academic year. For the academic year 1979-80, she was placed on tenure track and given one year tenure accrual for the 1978-79 academic year. The testimony of Mr. Featheringill and Mr. Trudeau is believable. There is no evidence that Ms. Wollert was discriminated against because of her sex in 1978-79 when she was placed on a fixed-term appointment

for one year and thereafter allowed tenure accrual for the 1978-79 academic year.

Ms. Wollert next claims that she was discriminated against because of her sex in that she was not promoted from assistant professor to associate professor as rapidly as she should have been. Ms. Wollert became an assistant professor in September, 1978. At PSU, unlike the other institutions, every faculty member is considered for promotion every year, whether eligible or not. Therefore, Ms. Wollert was first considered for promotion in 1980. At that time the minimum time for eligibility for promotion to associate professor was 3.0 FTE years in rank as assistant professor. Therefore, in 1980 and 1981 Ms. Wollert was not eligible for promotion. From October, 1980, until

January, 1982, she was on full-time maternity leave. As soon as Ms. Wollert became eligible for promotion, she was recommended for promotion. Had she not left PSU in 1983, when her husband accepted a position in Saskatchewan, Canada. She would have been promoted to the rank of associate professor. The court concludes that Ms. Wollert has no promotion grievance against PSU.

Ms. Wollert next claims that she was discriminated against because of her sex in that she was not granted tenure in a timely fashion. Ordinarily, tenure is granted only after 5.0 FTE years of service in a tenure track position. Ms. Wollert was placed in a tenure track position in September, 1979, but given credit for tenure track for the academic year 1978-79. Therefore, Ms. Wollert should have been qualified for tenure in

1982. Her department chair recommended that tenure be deferred because Ms. Wollert had only 3.29 FTE years credited toward tenure due to requested leaves of absence and requested reduced appointments.[1] The department chair later reconsidered his decision and supported an award of early tenure despite the fact that Ms. Wollert lacked 1.71 FTE years required for tenure. The evidence indicates that Ms. Wollert was the only faculty member at PSU who had received an early award of tenure. The court concludes that Ms. Wollert cannot prevail on her claim of sex discrimination regarding tenure.

Ms. Wollert's last complaint is a salary complaint. She claims that she is equally qualified with Glenn Gauer and has per formed substantially the same work as he has performed, but that she

has received less pay than he has received. Mr. Gauer is a scene designer who came to PSU as an assistant professor in September, 1977, at the same time that Ms. Wollert's position of Seamstress II became an academic position and she was given an appointment at the rank of instructor. At that time Mr. Gauer had had three-and-one-half years of prior experience as an assistant professor, including some period of time at Carnegie Tech., which is a prestigious school of theater design. Mr. Gauer has a Master of Fine Arts degree, which is a terminal degree. Ms. Wollert does not have a terminal degree. Furthermore, Ms. Wollert's only teaching experience before coming to PSU was as a graduate student. As a classified employee during the 1976-77 academic year she did not do any teaching. Mr. Gauer's

starting salary at the rank of assistant professor in 1977 was $13,385. In 1978, when Ms. Wollert was appointed to the rank of assistant professor, her salary was $13,000. In 1982, when Mr. Gauer was promoted to the rank of associate professor, he was paid $19,850. That same year, Ms. Wollert, who was still an assistant professor, was paid $18,854. Between 1977 and 1983, Mr. Gauer's salary increased 37.4%, while Ms. Wollert's salary increased 43%.

Assuming but not deciding that the positions of scene designer and or costume designer are substantially equal positions, Ms. Wollert cannot prevail on her sex discrimination in salary claim.

Ms. Wollert Footnote

1. Ms.Wollert's FTE is shown as follows:

1978-79	1.0 FTE
1979-80	1.0 FTE
1980-81	.46 FTE
1981-82	.33 FTE
1982-83	.50 FTE

UNIVERSITY OF OREGON

EUGENE, OREGON

Madronna Holden

Lois Schreiner

Dr. Ruth Waugh

DR. MADRONNA HOLDEN

Dr. Madronna Holden, formerly assistant professor of anthropology and Director of Ethnic Studies at the University of Oregon (U of O), claims that she was discriminated against because of her sex while serving as Director of Ethnic Studies in that: (1) she was paid less than Dr. George Mills, an equally qualified man who preceded her as Director of Ethnic Studies; (2) she was not given administrative or economic assistance in fulfilling her duties as Director of Ethnic Studies; (3) she was given a heavier workload than male administrators and program directors; and (4) she was not given access to U of O grievance procedures due to her participation in this lawsuit. Dr. Holden filed a complaint with the Equal Employment Opportunity Commission and

received a Right to Sue Letter dated August 8,1980.

Dr. Holden received a B.A. degree in philosophy from St.Martins College in 1968 and an M.A. degree and a Ph.D. degree in anthropology from the New School for Social Research, New York City, New York, in 1971 and 1974, respectively. While she was working for her Ph.D. degree, Dr. Holden served as an assistant professor of anthropology at the State University of New York, Oneonta College Campus. She has also held various research assistant positions and has attended a summer folklore seminar at Harvard University. Immediately prior to coming to the University of Oregon in 1976, Dr. Holden was engaged in grant-funded research collecting folklore and oral history from Native Americans in the State of Washington. At the time of her

hire, she had part of her work accepted for publication as a lead article in the Journal of American Folklore, a refereed journal.

The Ethnic Studies Program, an interdisciplinary program, began at the U of O in the early 1970's. The purpose of the program was to promote cultural pluralism among U of O students. The Ethnic Studies Program was intended to increase awareness of the history and culture of minority groups among all U of O students, but in particular minority students. The Ethnic Studies Program was not intended as a minority support program however.

The person hired to develop the program was Dr. George Mills, who served as director during the 1973-74 and 1974-75 academic years. Dr. Mills and various graduate teaching assistants

BEST AVAILABLE COPY

ANNOUNCEMENT

UNIVERSITY OF OREGON

College of Liberal Arts
office of the dean

EUGENE, OREGON 97403
telephone (code 503) 686-3001

ANNOUNCEMENT OF POSITIONS IN ETHNIC STUDIES

The University of Oregon is accepting applications for one, and possibly two, teaching/administrative positions in its Ethnic Studies Program. Salary and level of appointment depend upon the qualifications of the candidates.

These are full-time joint appointments with the Ethnic Studies Program and an academic department in the College of Liberal Arts. The academic field is left open, with a preference for anthropology, history, literature, political science, psychology, or sociology. Candidates must have credentials acceptable to the academic department (Ph.D., college teaching experience, with a record of scholarly publications preferred), and must give evidence of competency in and commitment to ethnic studies.

The positions involve both administrative and academic responsibility. The candidates would teach in an academic department and both teach and carry administrative responsibilities in the Ethnic Studies Program. Appointees must be able to work effectively with the faculty and administration to strengthen the undergraduate Ethnic Studies Program and to develop upper division courses. The University of Oregon is an equal opportunity/affirmative action employer.

Applications must be received by April 1, 1976 to be considered. Send Vita and references to:

Ethnic Studies Search Committee
c/o Guido Palandri
Library
University of Oregon
Eugene, Oregon 97403

DEFENDANT'S EXHIBIT 3772 A

taught the courses in the Ethnic Studies Program. Dr. Mills died suddenly in August, 1975. Since it was too late to hire anyone to replace Dr. Mills for the 1975-76 academic year, the Ethnic Studies Program was administered that year by a group of five faculty members from other disciplines who were interested in and/or taught in the program. During the 1975-76 academic year an "Announcement of Positions in Ethnic Studies" was published in the Chronicle of Higher Education. A copy of that announcement follows this page. Dr. Holden saw that announcement and applied for one of the positions.

After screening hundreds of applicants, the U of O offered positions to two people: Dr. Holden and Dr. Clarence Williams.[1] Dr. Williams was offered the position of Director of

Ethnic Studies/assistant professor of history, and Dr. Holden was offered the position of Assistant Director of Ethnic Studies/assistant professor of anthropology. Dr. Williams did not accept the offer. Dr. Holden was then offered a new position: Director of Ethnic Studies/assistant professor of anthropology. Dr. John Baldwin, then-Dean of the College of Arts and Sciences, testified as follows:

> It had been envisioned that Clarence Williams would be the director. An older person, more experienced, so forth. He declined the offer at a time when Madronna Holden was still considering what she should do. The minute he declined, I was in phone contact with Dr. Holden, explaining the situation to her, making clear that if she came, that is, we couldn't very well prolong our search in the middle of the summer and anticipate recruiting a person of appropriate background and quality. The offers were made simultaneously or nearly

simultaneously. Dr. Holden knew of the situation with respect to the second offer prior to her decision.

. . .

I'm trying to say this properly. I personally informed Dr. Holden, while she was still considering the Oregon offer, that were she to come in the fall, she would be the chief person in ethnic studies and would have rather more administrative responsibilities and correspondingly reduced teaching responsibilities than would have been the case if we had had a second person.

Q [By Mr.Lidz] Did you offer Dr. Holden any adjustment in her salary as a result of her accepting the director's position rather than an assistant director's position?

A No. Perhaps I should clarify that, that simple no answer.

Program directors in the college are compensated through their regular academic salaries. That is, when a person who is in the English department becomes director of general literature for a year, nothing happens to that person's salary. There is no

> salary premium for being a program director.
>
> Rather, the recognition of the additional responsibility comes through a reduction in teaching assignments.

(Tr. 11,781-783).

The Ethnic Studies Committee had offered a higher salary to Dr. Williams as Director of Ethnic Studies/assistant professor of history than it did to Dr. Holden as Director of Ethnic Studies/assistant professor of anthropology. Dean Baldwin explained this salary differential as follows:

> The salary figure I originally recommended for Clarence Williams caused some outrage on the part of the ethnic studies search people. They went to the provost and said, "There's no way he'll come for this. You've got to go not an extra mile but an extra five miles." And the --
>
> THE COURT: What did he do? What was he doing?

> THE WITNESS: He was completing a career in the Air Force where he had had substantial administrative experience, and finishing his doctoral studies in sociology. He did not yet have his degree.
>
> So pressure from senior faculty associated with ethnic studies caused Harry Alpert to increase the salary over -- beyond what I had originally recommended. He took the highest figure that he could reasonably justify based on salary scales determined nationally for ethnic studies; whereas, Madronna Holden's salary had been predicated on national salary information for anthropology.
>
> . . . The salary offer that we made was -- was rejected with some scorn as simply not what he was able to command in the marketplace.(

Tr. 11,874-875).

Apparently, the U of O had recruited Dr. Williams, a black Air Force officer, with a high salary offer. When he declined the offer, the U of O did not extend the same offer to Dr. Holden.

However, she did accept the offer that was extended to her -- a full-time joint appointment as Director of Ethnic Studies/ assistant professor of anthropology. Dr. Holden does not claim that Dr. Williams is a comparator for the purposes of her sex discrimination in salary claim, and she does not claim sex discrimination in hiring.

SALARY CLAIM

Dr. Holden claims that she should have been paid as much as Dr. George Mills, her predecessor, who died in August, 1975. The evidence reflects that Dr. Holden's salary in 1976 was lower than Dr. Mills' salary at the time of his death.

In order for the court to draw an inference of sex discrimination in salary, the court must first find that Dr. Holden was equally qualified with

Dr. Mills and that she performed substantially the same job as he performed.

Dr. Mills was hired on a twelve-month contract for the 1973-74 academic year to create, administer, and teach an ethnic studies program. Dean Baldwin explained the reasons for Dr. Mills' twelve-month contract:

> George had a substantial start-up challenge to face, and that was precisely the reason he was given an initial twelve-month contract. It's curious, and this is by way of an admission at the clumsiness of the university bureaucracy sometimes, in the faculty legislation calling for the appointment of an ethnic studies director, the faculty urged the appointment of that person on a twelve-month contract for the first year to allow a full summer for preparation for the initiation of the program. And such a contract was provided. And the following year, the budget office came through with another twelve-month contract rather than the nine-month

> contract that had been anticipated, a curious artifact, but there it was.

(Tr. 11,766). Dr. Holden was hired on a nine-month contract. Much of the difference in the salaries of Dr. Mills and Dr. Holden is explainable on the basis of the twelve-month and nine-month contracts for which they were hired.

Dr. Mills and Mr. Holden's jobs were also different. Dr. Mills organized the Ethnic Studies Program, and he also taught (with the assistance of graduate teaching fellows) the ethnic studies classes. Dr. Holden was the administrative head of the Ethnic Studies Program, who arranged for faculty to teach the classes. Her primary assignment was in the Department of Anthropology. Each discipline commands its own salary level. Her salary was based on the salaries of faculty in the

Department of Anthropology. Her salary was at the median of assistant professors in the Department of Anthropology and above the median of other assistant professors who were program directors at the U of O. Dr. Mills' salary was based on comparable salaries of Ethnic Studies faculty throughout the United States.

Dr. Mills and Dr. Holden's backgrounds and prior experiences were very different. Dr. Mills had received his Ph.D. degree three years before Dr. Holden. He had taught at Gonzaga University, Eastern Washington State College, the University of South Dakota, and Whitworth College. He had been the director of the Washington State Title III project for two years. He had served as the consultant for a desegregation workshop and for the Action Program at

Eastern Washington State College. He had directed a career opportunity program in Spokane for one year. He had been the main instructor for an Indian education program in South Dakota. He also had extensive experience as an educator of mentally retarded children and mentally handicapped adults. Dr. Mills was a Native American.

In short, Dr. Mills brought a different range and quality of experience to the position of Director of Ethnic Studies than did Dr. Holden. Because of the differences in the lengths of their contracts, their prior experiences and education, and the nature of their responsibilities, Dr. Mills is not an appropriate comparator for Dr. Holden. Dr. Holden cannot prevail on her claim that she should have been paid

the same salary as Dr. George Mills.

WORKLOAD

In support of her claim that she was discrininatorily overburdened in her position as Director of Ethnic Studies, Dr. Holden points to a series of incidents, each of which she claims is evidence of unusual and unfair treatment of her because of her sex.

Dr. Holden first complains that she was not given a job description for the position of Director of Ethnic Studies and therefore her job had no boundaries and was overwhelming. In response to this complaint, Dean Baldwin testified as follows:

> Q [By Mr. Lidz] Okay. Do you recall in that fall receiving a request from her for a job description?
>
> A I recall conversations with Madronna Holden at several

points throughout her tenure at Oregon expressing concern with the multiplicity of tasks she felt responsible to fulfill.

Job descriptions at the University are provided to classified personnel, or, more specifically, job descriptions come from Salem for the various classified personnel ranks.

Job descriptions are not provided to academic personnel. The obligations of academic employees of the University are spelled out in the University of Oregon Faculty Handbook. They are not a matter of individual specification. The character of the job she was recruited to undertake may be, I think, most accurately gleaned from looking at the job description provided in the search document. But there is no separate job description available for Madronna Holden's position or any other academic position.

. . .

A It's no surprise that many academics do feel from time to time enormously overworked and from time to time, terribly underpaid. That is a sense that comes upon various members of the teaching

faculty from time to time.

> There were occasions when Madronna Holden came to the office to talk about one problem or another when quite evidently she was feeling these -- these concerns. And I -- I surely reflected with her on these matters and tried to communicate to her that she wasn't alone. That is, all members of the faculty from time to time reach a point of frustration and sense of isolation and a sense of helplessness in the -- in recognizing the enormity of the task and 24 hours a day isn't enough.

(Tr. 11,793-795).

Neither Dr. Holden nor any other academic employee at the U of O received a job description.

Dr. Holden next complains that the Ethnic Studies Program had inadequate space and that Dean Baldwin was insensitive to the program's needs and reprimanded her for talking with a space analyst regarding the space problem. The

court finds that Dean Baldwin assisted Dr. Holden in obtaining more space for the Ethnic Studies Program. He testified as follows:

> Q [By Mr.Lidz] What is involved -- can you tell us what was involved in finding more space for the ethnic studies program?
>
> A Ethnic studies wanted more space and, understandably enough, they wanted space contiguous to the space they already had. So what was involved in this instance was finding alternative space for the people moved out so ethnic studies could have that space. That is, it wasn't vacant space. It was space used by other members of the academic community and we had a musical chairs kind of event to somehow work out, to find more space for the people who were displaced and so on. Several alterations.
>
> Q Did you find that space?
>
> A We did and additional space was provided to the ethnic studies program.
>
> Q To the best of your knowledge, did you ever

> reprimand Dr. Holden for telling the space analyst that ethnic studies had a real program and might grow in the future?
>
> A No. No. I certainly did not reprimand Dr. Holden.

(Tr. 11,798-799).

The court concludes that inadequate space posed a problem for the Ethnics Studies Program. Dr. Holden attempted to resolve the problem by dealing directly with a U of O space analyst rather than the Dean. Thereafter, Dean Baldwin was able to resolve the problem. If unpleasant words were exchanged between Dr. Holden and Dean Baldwin, it was not because of Dr. Holden's sex.

Dr. Holden next complains that a second faculty member was not hired for the Ethnic Studies Program in the summer of 1977 as promised, and therefore she

was overburdened with work. Dean Baldwin testified as follows:

> Q [By Mr. Lidz] Now, Dr. Baldwin, during the course of the 1976-77 year, was there a continuing search for a second position in ethnic studies?
>
> A There was a search, yes.
>
> Q Was an offer made to a top candidate?
>
> A An offer was made with some difficulty. By the time the search committee had completed their deliberations, our budget reduction for the following year had already been communicated. And the best we could do at that time was provide funds for half a position. We went a step further by working with the history department. The top candidate selected by the ethnic search committee was a historian. We worked with the history department, cajoled them, call it what you will, and finally gained their agreement to help support the position. They would have one extra course taught through history by the recruit and we were able to then offer a position at two-thirds time or a little better. .7 FTe. I've forgotten the details now, but

the job offer went out to a historian, a man named Gonzales, who was teaching at Santa Cruz while he was completing his dissertation. He came well recommended, did well in his interview on campus, and was extended the offer. He elected to remain in Santa Cruz and stay with the part-time teaching responsibility there rather than come to Eugene.

Q Was there a second candidate?

A Dr. Holden asked in August that another person [a woman] be appointed and I was unwilling to extend that appointment. The appointment at that time, without the participation of history in the budget, would have been only for half a position. That's all the money that we had. And I did not feel justified in recruiting to Eugene from Colorado a member of the faculty for a one-year appointment. It struck me as an inappropriate exercise. I might add that I refused to extend another appointment at this time for a position in biology under the same circumstances, that is, biology through putting together leave money and so forth, came up with funds for a full position.

> They wanted to extend the offer to a scientist from the University of Washington, but they had no money for the following year. And their hope was that somehow or another the money would materialize, that somehow after asking this person to move, that the funding would take care of itself, and in that case again, I said no, we can't do that, it's not a decent way to treat people.

(Tr. 11,804-806).

The court concludes that Dr. Baldwin's refusal to extend an offer to an out-of-state resident (a woman) to assume a temporary half-time position was reasonable and related to financial problems at the U of O rather than Dr. Holden's sex or the sex of the applicant.

Dr. Holden next complains that Dean Baldwin rejected her request for a courtesy appointment as a research associate for Waris Eishaq. Courtesy

appointments had been easily obtained until Dr. Paul Olum became the Provost. Because he felt that courtesy appointments had been abused in the past, Provost Olum would not approve courtesy appointments without an adequate explanation. Dean Baldwin testified that he requested a statement of reasons for the requested courtesy appointment and a copy of Mr.Eishaq's curriculum vita for Provost Olum. He received neither. Therefore, Mr. Eishaq did not receive the courtesy appointment. There is no evidence in the record that Mr.Eishaq's failure to receive a courtesy appointment was related in any way to Dr. Holden's sex.

Dr. Holden complains that, when she arrived at the U of O in 1976, she received a "peculiar" budget change form, showing a reduction in the Ethnic Studies

budget of $4298. She claims this budget cut was somehow related to her sex. In fact, this was a routine budget change form which reflected a decision which had been made in the spring of 1976 to reduce the number of graduate teaching assistants assigned to the Ethnic Studies Program from four to three. Dr. Holden was not consulted about the change because she had not been hired when the change was authorized. The Ethnic Studies Committee and Dean Baldwin made the decision to reduce the number of graduate teaching assistants based upon budgetary needs, and this decision was in no way related to Dr. Holden.

Dr. Holden complains that Dean Baldwin treated her in a patronizing manner. Dr. Holden testified that when she met with Dean Baldwin and asked him to provide funds for a second faculty

member for the Ethnic Studies Program, Dean Baldwin patted her hand and said, "Madronna, Madronna, we all have our little problems." Dr. Holden testified that she never saw Dean Baldwin pat the hand of a male administrator.

Dr. Holden also testified that on another occasion Dean Baldwin told her she was lucky he had protected her program to the extent that he had and that that was all she should hope for. Dean Baldwin denied making any patronizing statements to Dr. Holden and explained that Dr. Holden's treatment was no worse than the treatment of other faculty during a time of financial distress. Dean Baldwin was a credible witness.[2]

Dr. Holden next claims she was overburdened in her teaching responsibilities. Actually, Dr. Holden

received more release time from her teaching duties in the Department of Anthropology than most program directors. Dr. Holden taught three courses during her first year as Ethnic Studies Director rather than the five courses that program directors ordinarily teach. In her second and third years as director, she taught four courses. Since the typical amount of release time for a program director is only one course, her workload was actually less than other program directors. In addition, Dr. Holden had a half-time secretary, which was more secretarial support than any other program director in the College of Arts and Sciences received, and the services and supplies budget for the Ethnic Studies Program, adjusted for the size of the program, was the highest in the College. The court therefore finds that

Dr. Holden's claim of sex discrimination with regard to her workload and lack of administrative support are without merit.

Dr. Holden's three year contract as Director of Ethnic Studies expired with the 1978-79 academic year. Thereafter she was a full-time assistant professor of anthropology for one year. Dr. Holden made no complaint in this suit with regard to the ultimate termination of her contract in 1980.[3]

COURT'S CONCLUSION

With respect to the quality of Dr. Holden's performance as Director of Ethnic Studies, Dean Baldwin testified as follows:

> Q [By Mr. Lidz] Turning to Dr. Holden's performance as a faculty member and program director over the three years in which she served as ethnic studies director,can you

comment on her performance as director of ethnic studies?

A One has to respond to that question in three sub-responses. As an administrator of the ethnic studies program, her performance was below that of other program directors. That is, she seemed to have difficulty with many of the routine administrative tasks of the post, as well as with more generalized functions in long-range planning and program definition.

As a teacher, she did a very commendable job in courses relating to field methods and folklore. There were some dissatisfactions with her relative inaccessibility outside of scheduled classes.

Although she had an office with the other anthropology offices, in addition to her ethnic studies office, students could not reach her at that office. That is, she was very rarely there and did not attend departmental faculty meetings and colloquia.

Her scholarly life over her period of tenure as director of ethnic studies simply did not materialize. There were no publications stemming from that period.

(Tr. 11,817-818).

Dr. Holden was not a particularly good administrator. In addition, she assumed the position of Director of Ethnic Studies at a difficult time. When she became director there was committee leadership -- the prior director had died a year earlier. Also, she attempted to change the direction of the program in order to make it more "academic." From the evidence, it appears that many students and townspeople wanted the program to be a support group for minority students. Then she was immediately confronted with legislatively mandated budget cuts that made her job even more difficult. No doubt, Dr. Holden had problems, but she has not proved to this court that any of them stemmed from being a woman. They stemmed

from the demands of the position, the financial exigencies of the times, and her own limitations as an administrator.

Dr. Holden cannot prevail on her individual claims.

Dr. Madrona Holden Footnotes

1. At the time he was offered the position, Dr. Williams was just completing his Ph.D. degree.

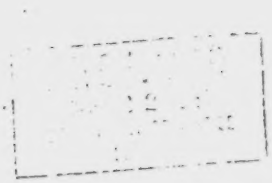
2. Dr. Deanna Robinson, a class witness and a U of O faculty member who worked as an administrative intern for Dean Baldwin, testified that she considered Dean Baldwin to be a "role model" for herself and that he treated her "very, very well."

3. Plaintiffs' Proposed Findings of Fact 24 and 27 read as follows:

> 24. Dr. Holden received a letter from Dr. Paul Olum, then Acting President of the university, stating that she would not be allowed to go through grievance procedures at the university as long as she was involved in the court suit.
>
> . . .
>
> 27. Dr. Holden was discriminated against on the basis of her sex in that she was denied access to the grievance procedures due to her participation in this lawsuit.

A copy of the letter of Dr. Olum, Defendant's Ex. 3772P, mentioned in Plaintiffs' Proposed Findings of Fact 24 follows this page. The court has very little evidence on this issue. If Dr. Holden has a grievance that is not

resolved by this court's ruling, the court assumes that the grievance procedures at the U of O are still available to Dr. Holden.



Office of the Vice President
for Academic Affairs and Provost
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3031

July 3, 1980

File - 001
020

Madronna Holden
3470 Potter Street
Eugene, OR 97405

Dear Madronna:

I am writing in response to your request to initiate University grievance procedures on your behalf.

Because the issues raised in your June 11 letter appeared to coincide with the issues implicated in the class action complaint in which you are a plaintiff against the Oregon State Board of Higher Education, I sought legal advice before reaching a decision about your request. The Chief Counsel for the State System of Higher Education advised me that because you have chosen a more comprehensive forum in which to assert your claim, i.e. the U. S. District Court, it would be inappropriate to engage in a parallel process of University grievance procedures at this time. Although, as a consequence, we will hold your grievance in abeyance for the present, I assure you that we will be prepared to proceed with it, if you wish to do so, after the class action complaint has been resolved.

Cordially,

Paul Olum
Acting President

PO:KN

an equal opportunity/affirmative action employer

DEFENDANT'S EXHIBIT 3772 P

LOIS SCHREINER

Lois Schreiner, a retired documents librarian at the University of Oregon (U of O) library, claims that she was discriminated against because of her sex in that (1) she did not receive a pay raise when she served as acting head of the documents section; (2) she was not appointed to the combined position of head of the documents section/assistant head of the reference department in the library; and (3) even though she did not receive the appointment, she should have been paid the same as the person who received the appointment because she was equally qualified with him and performed substantially the same work as he performed. Ms. Schreiner filed a charge of sex discrimination with the Equal Employment Opportunity Commission and

received a Right to Sue Letter on November 10, 1980.

Ms. Schreiner received a B.S. degree in geography from the U of O in 1968, and a Master of Library Science degree from the U of O in 1969. From July, 1958, until she received her Masters degree, she was a classified employee at the U of O library working as a secretary to the head of the serials section (1 year); as a library assistant in the government documents section (10 years); and as a library assistant in the general reference division (1 term).

FIRST SALARY CLAIM

On January 1, 1970, Ms. Schreiner became an academic employee, an instructor. She worked part time in the documents section and part time in the general reference department until September, 1973, when she became employed

full time in documents. In July, 1975, she was promoted to assistant professor and granted tenure. She also served as acting head of the documents section during the summer of 1975 and from October 1, 1976, to January 1, 1977. She served as head of the documents section from January 1, 1977, until October, 1977. Thereafter, she was transferred to the social science section for 5 1/2 months and then back to documents.

Her first claim of sex discrimination stems from the fact that her salary was not increased when she became acting head and later head of the documents section. Ms. Schreiner testified as follows on this issue:

> Q [By Mr. Willner] In the fall of 1977 did you have a conversation with Dr. Bill Axford, the head of the

library, concerning your compensation?

A Yes.

Q What was that conversation?

A In late September I went to Dr. Axford and asked him if I couldn't have a raise because of my additional responsibilities as head of the documents section.

Q All right, and what was Dr. Axford's response, both in words and action?

A Dr. Axford said that the documents section would no longer be autonomous; that he would put it under the umbrella of social science and that Holway Jones would be the head of documents, and I would no longer be the head of documents.

Q And I take it you got no raise?

A And I got no raise, true.

(Tr. 4110).

In response to this claim, Donald Smith, assistant university librarian for budgeting and planning, and former

acting university librarian, testified as follows:

> Q [By Mr. Lidz] Do you recall a time in 1976 and 1977 when Mr. Axford -- well, who was Mr. Axford, by the way?
>
> A Mr. Axford was the university librarian from 1973 to '79.
>
> Q And do you recall a time in 1976 and 1977 when Mr. Axford appointed Lois Schreiner, first as acting head of the documents section and then as head of the documents section?
>
> A Yes.
>
> Q Do you recall if she received a salary increase for assuming those responsibilities?
>
> A No, she did not.
>
> Q Do you know why not?
>
> A Well, it's not the custom to give salary increases for such appointments. The salaries are based on your academic rank for most positions from instructor through professor.
>
> Q Would anybody else have received, then, an additional salary or a salary increase for

assuming additional responsibilities ----

A No

Q -- promotions in rank?

A Not at that time.

(Tr. 12,231-233)

Mr. Smith's testimony is not rebutted. Ms. Schreiner's administrative duties were not extraordinary. Within the academic community it is not unusual for faculty members to perform administrative duties without additional compensation. Whether or not this employment practice is a good employment practice is not the issue before the court. The only issue is whether this practice was applied in a discriminating manner against Ms. Schreiner. There is no evidence that it was.

ADMINISTRATIVE CLAIM

In 1979, Mr. Smith, who was then acting university librarian, appointed Ms. Schreiner to serve on a search committee for the combined position of head of the documents section/assistant head of the reference department. Before accepting an appointment as a search committee member, Ms. Schreiner told Mr. Smith that she was considering applying for the position her self. He told her that if she did apply, he would not recommend her. Ms. Schreiner testified as follows:

> Q [By Mr. Willner] Ms. Schreiner, when there first was discussion of instituting a search for the position of head of documents, did you talk to Mr. Smith, the acting head librarian, about your applying for the position?
>
> A Yes.
>
> Q And what did you understand the duties of the posi tion were that was to be advertised?

A Similar to what I had been doing as head of documents.

...

Q What did Mr. Smith tell you about whether you could apply for the position?

A When I asked if I could apply for the position rather than staying where I was, I asked him if I could apply, and he said, "Yes, but you won't get the job, because you have not been to school anywhere else but the University of Oregon and you have not worked anywhere else but the University of Oregon."

Q Do you know any other person who was given similar information by Dr. Smith?

A No, I do not.

(Tr. 4113-4114).

Thereafter, Ms. Schreiner decided not to apply for the position and served on the search committee, which selected Tom Stave for the position.[1]

In response to her contentions, Mr. Smith testified as follows:

Q [By Mr. Lidz] Do you recall discussing the search for a new head of documents with Lois Schreiner in 1979?

A Yes.

Q And is that the position for which Tom Stave eventually was hired?

A Yes.

Q Can you describe the discussion that you had with Ms. Schreiner concerning her interest in the position?

A Yes, she was a member -- I appointed her as member of the search committee to -- for that position as the head of the documents section and assistant head of the reference department.

And she came to me to ask what I thought her -- she was interested in applying for that position, and she asked me what I thought her chances were of securing appointment since I had explained to her that she had to choose between either being on the search committee or being an applicant -- a candidate for the position.

And I said, well, I really couldn't tell her what it would be until the committee had even

met to consider. And she said she wanted a more definitive answer than that. She wanted to know what I would suggest, what I would recommend.

And I said I would not recommend her appointment for several reasons. One, that she did not have the administrative experience or ability, she did not have the experience in other libraries. Her only employment has been in the University of Oregon library as a librarian. I felt that her preparation for that position was inadequate.

Q And at that time had you already observed her performance as acting head and head of documents ----

A Yes.

Q -- in 1976 and '77?

A Yes.

Q Can you compare her performance in that position with Tom Stave's later performance in that position?
A Can I compare them?

Q Yes.

A Yes, I think I can give some comparison.

> Stave brought to the position experience from employment in the Library of Congress, for example, and knew much more about -- about documents themselves, federal government documents. And as such, in a -- serving as a reference librarian, was able to serve far better than Lois served as a reference librarian.
>
> And as far as administrative ability is concerned, Tom Stave has a pleasant personality and seeks to get along with everyone and manages everything very smoothly, while Lois Schreiner, on the other hand, has a very frank presentation, outspoken, honest, somewhat abrasive as a result.
>
> Secondly, in general performance, Stave is cooperative, follows instructions, while Schreiner tends to be at times insubordinate or at least at that time.

(Tr. 12,233-235).

Mr. Smith's reasons for saying he would not recommend Ms. Schreiner for the administrative position do not appear to be gender related. The U of O is one

of the major research institutions in the State of Oregon. Academic "in-breeding" -- that is, a practice whereby faculty who receive their degrees from an institution remain at that institution without studying or teaching elsewhere -- is ordinarily discouraged. These "in-bred" people often do not progress or do not progress rapidly up the academic ladder or receive administrative positions. However, the court will review the faculty evaluation ratings that Ms. Schreiner received during her tenure as an academic employee, and will also review how other women have been treated by the U of O library administrators in order to determine whether Smith's explanation is merely a pretext for sex discrimination.

Ms. Schreiner and other faculty librarians are evaluated on the quality

of their professional services, their professional growth, leadership in academic and administrative service, and service to the larger community. This evaluation is on a five point scale, with five being low and one being high. Out of the 45 library faculty who are reviewed every year, only four or five have received ratings below three. Ms. Schreiner has been rated at three in many of her supervisory performance and attitude evaluations. See Ex.3776(e). Her supervisors have had to urge her to participate in activities which would broaden her horizons. She was criticized for having a "civil servant" mentality -- that is, she expected to work a 40-hour week and be given salary increases based on length of service and responsibilities undertaken. In the academic community, faculty members are expected to give the

time necessary to complete the job for the amount of pay given; salary increases are to be based primarily on merit and small across-the-board increases. She preferred to work on the detailed technical aspects of her job rather than the administrative, people-oriented aspects. Clearly, Ms. Schreiner was a marginal faculty member in the areas of leadership and supervisory ability, the very attributes that were necessary for the administrative position at the U of O library.

Other women at the U of O library have received administrative appointments. For example, Patricia Silvernail, head of the Public Service Division; Isabel Sterling, head of the science library; Alice Allen, head of the catalog department; Katherine Eaton, head of the bureau of governmental

research; Virginia Parr, head of the educational psychology section; Elaine Kemp, acting assistant librarian for technical services.

The court concludes that sex discrimination was not the basis for Mr. Smith's statement to Ms. Schreiner that he would not recommend her for the administrative position she sought.

SECOND SALARY CLAIM

Lastly, Ms. Schreiner complains that she should be paid the same as Tom Stave, who was hired as the head of documents/assistant head of the reference department by the committee on which she served. Ms. Schreiner testified that when Mr. Stave assumed the position as head of documents/assistant head of the reference department, his duties were essentially the same as she had performed, except that he was not

responsible for foreign and international publications as she had been, and he did not supervise as many students as she had supervised. He also received nearly $3,000 more salary than she received.

The Board first argues that Ms. Schreiner's salary reflects the fact that she has been a mediocre employee and since academic salaries are primarily based on merit, her salary is necessarily low. Second, the Board argues that Mr. Stave is an inappropriate comparator for Ms. Schneider because of differences between their prior experiences and present responsibilities.

The court will first address the issue of Ms. Schreiner's "merit" as a librarian as it relates to her pay. Ms. Schreiner has had several major

impediments in her career aspirations at the U of O library. First, she received her B.A. and M.A. degrees from the U of O and she has done very little work or study away from this institution. University Librarian George Shipman explained why this is a career handicap for a librarian:

> Q [By Mr. Lidz] Mr. Shipman, is there some premium or value placed on experience at other libraries for a librarian?
>
> A There is for me for this library and most academic libraries.
>
> Q Why is that?
>
> A Well, the primary reason is that when an institution -- when a University library does not have movement, that is, from one institution into this library or from a number of institutions into this library, we tend not to be aware of natural developments and, more importantly, specific successful and perhaps unsuccessful programs being pursued at other institutions.

> The -- the fact is, in my feeling, that the library can become very stultified if we are not aware of developments in other institutions.

(Tr. 12,197-198).

Second, Ms. Schreiner did not make up for this career disadvantage by being active in librarianship outside of the State of Oregon.

> [Mr. Shipman's answer to question by Mr. Lidz] Lois seemed to be adequate at meeting the daily needs of her job, but she did not seem materially interested in -- in librarianship at the national level. She hadn't participated actively in the major associations of the country.

(Tr. 12,201).

Another factor that impeded Ms. Schreiner's career at a major research institution library like the U of O library is that she did not have a second master's degree. While Ms. Schreiner has a master's degree in

library science, she should also have had a masters degree in some subject matter area such as English literature, European history, or psychology in order to be of the greatest help to the academics who use the library.

Mr. Shipman summarized his opinion of Ms. Schreiner's performance as follows:

> Q [By Mr. Lidz] Mr. Shipman, this may be a difficult question, but if you can answer it, I'd appreciate it: Overall, how would you compare Ms. Schreiner's performance as an assistant professor with that of other assistant professors in the library?
>
> A Somewhere between marginal and adequate.

(Tr. 12,214).

Perhaps more important than Ms. Schreiner's lack of credentials upon her "merit" as a librarian and therefore upon her pay is her abrasive personality and